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No. _____

In The
Supreme Court of the United States

CITY OF MAYFIELD HEIGHTS, MAYOR
MARGARET A. EGENSPERGER, et al.,

Petitioners,

v.

MICHAEL A. SHEMO, Trustee,
and LARRY GOLDBERG, Trustee,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

PETITION FOR A WRIT OF CERTIORARI

LEONARD F. CARR, ESQ. (#0029884)
Counsel of Record
L. BRYAN CARR, ESQ. (#0066649)
1392 SOM Center Road
Mayfield Heights, Ohio 44124
Telephone: 440-473-2277
Facsimile: 440-473-0166

ANTHONY J. COYNE, ESQ. (#0039605)
BRUCE G. RINKER, ESQ. (#0017493)
ELI MANOS, ESQ. (#0006468)
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
Telephone: 216-523-1500
Facsimile: 216-523-1705

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation.

2. Whether the sole remedy available to an owner of property encumbered by a zoning restriction that does not substantially advance a legitimate public purpose is invalidation of the restriction as a deprivation of property prohibited by the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

Petitioners not listed in the caption are City of Mayfield Heights Council; Charles Pona, President; Gregory S. Costabile; Geno Manfredi; Howard Sonenstein; Donald J. Manno; Sam Mercurio; and Michael Ballistrea; City of Mayfield Heights Planning Commission; David Zimmerman, Chairman; Margaret A. Egensperger; Bernard Stadelman; Al Kay; and Howard Sonenstein.

Respondents brought this action in mandamus in the Supreme Court of Ohio in the statutory form prescribed by the law of Ohio at Ohio Rev. Code Ann. §2731.04 (Anderson 2000), captioned *State ex rel. Shemo v. Mayfield Hts.* The case also includes the previous action brought by the Trustees directly against the City of Mayfield Heights, its Mayor and members of Council captioned *Shemo v. Mayfield Hts.*

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OPINIONS BELOW

The opinion of the Ohio Supreme Court issuing the writ of mandamus ordering Petitioner City of Mayfield Heights ("City" or "Mayfield Heights") to appropriate the property ("Subject Property") owned by Respondents Michael A. Shemo and Larry Goldberg, Co-Trustees ("Trustees") is reported at 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002) (App., *infra*, App. 1). The opinion of the Ohio Supreme Court modifying its judgment in part on the City's motion for reconsideration is reported at 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002) (App., *infra*, App. 46). Other opinions of the Ohio Supreme Court in the case are reported at 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001) (App., *infra*, App. 20) and 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001) (App., *infra*, App. 30). The opinion of the court in an earlier proceeding in the case captioned *Shemo v. Mayfield Heights* is reported at 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) (App., *infra*, App. 34). The opinion of the Cuyahoga County Court of Appeals for the Eighth Appellate District dated August 20, 1998 is unreported (App., *infra*, App. 56). Its entry of dismissal dated April 3, 1997 is unreported (App., *infra*, App. 62). The opinion of the Cuyahoga County Court of Common Pleas dated September 2, 1997 is unreported (App., *infra*, App. 65) and its opinion dated May 16, 1996 is unreported (App., *infra*, App. 67).

JURISDICTION

The judgment of the Supreme Court of Ohio issuing the writ of mandamus was entered on April 10, 2002. A timely motion for reconsideration was granted in part,

modifying the judgment, shortening the period of the temporary taking, but in all other respects was denied on October 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law;" U.S. Const. Amend. XIV §1.

The Takings Clause of the Fifth Amendment to the United States Constitution provides:

> "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Takings Clause was incorporated into the law of the states through the Due Process Clause of the Fourteenth Amendment by this Court's decision in *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897). *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243, n. 7 (1984).

STATEMENT OF THE CASE

This case squarely presents the issue of whether a zoning regulation which does not substantially advance a legitimate public purpose is *per se* violative of the Takings Clause of the Fifth Amendment to the United States

Constitution so as to require the payment of compensation by the governmental entity. In spite of the urging of *amici*, this Court declined to review the issue in *City of Monterrey v. Del Monte Dunes at Monterrey Limited*, 526 U.S. 687 (1999), finding the posture of that case unsuitable. *Id.* at 706. In this case, the Ohio Supreme Court cited this Court's application of the Takings Clause of the Fifth Amendment as binding authority, holding at 95 Ohio St. 3d 63 (App., *infra*, App. 7):

> The United States Supreme Court has consistently held that "application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" See *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126, 106 S.Ct. 455, 88 L.Ed.2d 419, quoting *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 485, 107 S.Ct. 1232, 94 L.Ed.2d 472.

At 95 Ohio St. 3d 64 (App., *infra*, App. 9), it held that the Trustees with respect to the "*Agins*[1] disjunctive test," "have satisfied the first prong, *i.e.*, the application of the U-1(1) and U-2-A zoning classifications to the Subject Property was unconstitutional in that the application of these classifications did not substantially advance legitimate state interests." And at page 65 (App., *infra*, App. 10) held that the Trustees did not establish the second prong of the

[1] *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

Agins test that the City's single-family zoning regulations deprived the Trustees of all economically viable use of the Subject Property. This case therefore definitively presents the issue of whether a zoning regulation found deficient in that it does not substantially advance a legitimate public purpose categorically effects a taking for which compensation is required. It poses a concern of local governments throughout the nation.

The Subject Property is a 22-½ acre platted but undeveloped single-family residential subdivision situated in the City of Mayfield Heights. In 1927 the municipality adopted a comprehensive zoning ordinance which classified the Subject Property in the single-family residential district. It lay vacant and unimproved. On January 21, 1992, Milton A. Wolf and Jack Goldberg, Trustees, after holding title to the Subject Property for several years, conveyed it to Michael A. Shemo and Larry Goldberg, Trustees. The beneficiaries of the trust are Milton A. Wolf and members of the Goldberg family. On March 19, 1992, the Trustees, without applying to the pertinent agencies of the City for amendment of the zoning regulations, filed an action in the Court of Common Pleas of Cuyahoga County, Ohio, requesting that the single-family residential zoning as applied to the Subject Property be declared unconstitutional and urging that the Subject Property be zoned so that it might be devoted to multi-family development.

In June, 1995, the Trustees dismissed that action and immediately re-filed, demanding that the single-family residential classification of the Subject Property be declared unconstitutional, but urging that it be zoned for the uses permitted by the Zoning Code of the City in the Local Retail and Wholesale District. In December, 1995, the City

and the Trustees entered into a stipulation that the single-family residential zoning of the Subject Property was invalid and provided the City 120 days from the date of journalization of the judgment entry invalidating the single-family residential zoning on the Subject Property to rezone it. The City rezoned the Subject Property into the Planned Unit Development Districts, permitting single-family attached and detached residences. On May 16, 1996, the Court of Common Pleas issued judgment declaring the residential planned unit development zoning of the Subject Property unconstitutional, but declined to order into effect the retail zoning as requested by the Trustees (App., *infra*, App. 78). On appeal to the Court of Appeals of Cuyahoga County, the action was remanded to the trial court with instructions to determine the reasonableness of the retail use (App., *infra*, App. 62). On remand, the trial court on September 2, 1997, declared the Trustees' proposed retail use reasonable and enjoined the City from interfering with the implementation of the proposed retail use by the Trustees (App, *infra*, App. 65). On appeal from that decision of the trial court, the Court of Appeals of Cuyahoga County, Ohio, remanded the case to the trial court to reconsider its decision in light of *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998), which modified the decision of the Ohio Supreme Court in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E.2d 533 (1994), upon which the trial court had relied (App., *infra*, App. 56). Rather than accepting the remand, the Trustees appealed to the Ohio Supreme Court, which upheld the finding of the trial court that the single-family residential use limitation applied to the Subject Property failed to advance "legitimate governmental health, safety and welfare concerns;" *Shemo v. Mayfield Heights*, 88 Ohio St. 3d 7, 13, 722 N.E.2d 1018, 1021, 1024 (2000) (App.,

infra, App. 34, 44) and so reversed the order of remand of the Cuyahoga County Court of Appeals. At App., *infra*, App. 36 the court held:

> "Since there was competent, credible evidence supporting the trial court's conclusion that the U-2-A zoning classification does not substantially advance a legitimate health, safety, and welfare concern of Mayfield Heights, we reverse the judgment of the court of appeals and reinstate the trial court's judgment declaring the zoning ordinance unconstitutional."

At App., *infra*, App. 44 it held:

> "Since appellants have shown that the city lacks any legitimate governmental health, safety, and welfare concerns in support of the U-2-A zoning classification, we find that the trial court was correct in declaring the U-2-A zoning ordinance unconstitutional."

The Ohio Supreme Court also held that the Trustees' proposed retail use of the Subject Property was reasonable and affirmed the trial court's decision with respect to its judgment approving the Trustees' proposed retail plan. *Id.* at App., *infra*, App. 44. On May 16, 2001, the Trustees requested a writ of mandamus from the Ohio Supreme Court to compel the City to bring appropriation proceedings to establish compensation for the alleged temporary taking during the litigation period. The application was dismissed on a technicality. *State ex rel. Shemo v. Mayfield Heights*, 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001) (App., *infra*, App. 30). The Trustees re-filed the application on July 23, 2001. The Ohio Supreme Court on April 10, 2002, issued the writ ordering the City to commence appropriation proceedings to pay compensation for the temporary taking

of the Subject Property from March 19, 1992, the date of the filing of the initial complaint for declaratory judgment protesting the zoning of the Subject Property, to April, 2001, when the City applied the Trustees' request for retail use. *State ex rel. Shemo v. Mayfield Heights*, 95 Ohio St. 3d 59, 69, 765 N.E.2d 345 (2002) (App., *infra*, App. 1, 18). On reconsideration, the Ohio Supreme Court modified its judgment to order that compensation be paid for the temporary taking commencing with June, 1995, when the Trustees filed their action suggesting that the appropriate zoning for the Subject Property was retail and warehouse development. 96 Ohio St. 2d 379, 384, 775 N.E.2d 493 (2002) (App., *infra*, 46, 55). The Ohio Supreme Court also made it clear that a categorical taking had occurred rather than engaging in the "ad hoc factual inquiries" this Court has generally stressed in considering land-use regulations and the Takings Clause. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124-125 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002). In rejection of our contention that the Trustees had not established that a taking had occurred under the *Penn Central* analysis, the Ohio Supreme Court held at 96 Ohio St. 3d 381, 775 N.E.2d 496 (App, *infra*, App. 50):

> Second, it is not evident that the *Penn Cent./Palazzolo* analysis applies to this case, in which the land-use regulations at issue were held to be unconstitutional as applied to the property, i.e., the U-1(1) and U-2-A zoning classifications did not substantially advance legitimate state interests. *Shemo*, 95 Ohio St. 3d at 64, 765 N.E.2d 345. Neither *Penn Cent.* nor *Palazzolo* involved a

> claim that the applicable legislation did not substantially advance legitimate state interests.

Thus, the Ohio Supreme Court has construed the Takings Clause of the Fifth Amendment to the United States Constitution to require the payment of compensation categorically by reason of a zoning ordinance that does not substantially advance the public welfare and upon invalidation of the regulation mandating payment of compensation for a temporary taking during the period from which the owner files an action challenging the validity of the zoning ordinance until the regulation is removed. Ohio law requires that invalidation of a zoning ordinance does not leave the property unzoned but directs the trial court to "give notice to the zoning authority that, within a reasonable time certain, it may at its option, rezone the property." *Union Oil Company of California v. Worthington*, 62 Ohio St. 2d 263, 267, 405 N.E.2d 277, 283 (1980). Thus, under the construction of the Takings Clause of the Fifth Amendment by the Ohio Supreme Court, compensation for a temporary taking must be paid notwithstanding the fact that state law procedures impose delays during change in the law. Other procedural delays ensued as the Ohio courts, in construing what they refer to as the two prongs of the takings holding in *Agins v. Tiburon, supra*, bounced from the decision in *Gerijo, Inc. v. Fairfield, supra*, to *Goldberg Cos., Inc. v. Richmond Hts. City Council, supra*.

This Court in the case "that gave birth to . . . regulatory takings jurisprudence," *Tahoe-Sierra, supra*, at 122 S.Ct. 1480, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), noted at page 413:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in

> the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.

Thus, Justice Holmes emphasized the Due Process Clause as the mainspring of the decision. Justice Brandeis related to Justice Frankfurter that in Justice Holmes's mind *Pennsylvania Coal Co. v. Mahon* was a substantive due process case. Robert Brauneis, *"The Foundation of our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon,* 106 Yale L.J. 613, 683, n.333 (1996). In its motion for reconsideration in the Ohio Supreme Court the City directly raised the applicability of the Due Process Clause to this case at page 3 of its brief, pointing out that the initial decision of the Ohio Supreme Court in this litigation reported at 88 Ohio St. 3d 7, 722 N.E.2d 1018 (App, *infra*, App. 34):

> "is grounded upon the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, which historically has been applied judicially to repeal irrational land use limitations imposed by government. *State ex rel. Synod of Ohio United Lutheran Churches in America v. Joseph* (1942), 139 Ohio St. 229; *Nectow v. Cambridge* (1928), 277 U.S. 172; *Moore v. East Cleveland* (1977), 431 U.S. 494, 514 (Stevens, J., concurring in judgment). The remedy has been judicial repeal of the offending legislation. A halt is called to the deprivation through the enforcement of the Due Process Clause."

REASONS FOR GRANTING THE PETITION

I. Due Process/Takings Clause Tension

This case presents squarely to this Court the issue of whether an errant or obsolete land-use regulation that does not substantially advance a legitimate governmental interest should be categorically treated in the same manner as physical invasions of land for devotion to public use by government for which the Takings Clause of the Fifth Amendment requires the payment of compensation or whether other factors must be considered such as those enumerated in *Penn Central Transportation Company v. City of New York*, *supra*, at 438 U.S. 124, "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action," or whether such a regulation imparting no benefit to the public should be examined pursuant to the Due Process Clause of the Fourteenth Amendment rather than the Fifth Amendment Takings Clause. The amici urged this Court to consider the question in *City of Monterrey v. Del Monte Dunes at Monterrey Limited, supra*, as is indicated by this Court's statement at 526 U.S. 706. Our First Question Presented is lifted from the Solicitor General's brief in that case as reported at Steven J. Eagle, *Substantive Due Process in Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1023 (2000). Justice Souter, writing for four Members of the Court in dissent in *Del Monte Dunes*, noted that in *Agins v. Tiburon, supra*:

> "One theory of recovery in inverse condemnation cases is that the taking makes no substantial contribution to a legitimate governmental purpose. This issue includes not only a legal component

> that may be difficult to resolve, but one so closely related to similar issues in substantive due process property claims, that this Court cited a substantive due process case when recognizing the theory under the rubric of inverse condemnation. See *Agins*, 447 U.S., at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447 (1928))."

In footnote 12 to that quote, Justice Souter states:

> "I offer no opinion *here* on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments." (Emphasis Supplied.)

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), this Court considered retroactive payments to a fund for retired coal miners challenged as violative of the Fifth Amendment Due Process Clause and Takings Clause. Five Members of this Court rejected the analysis of the case pursuant to the Takings Clause, *id.* at 539, 554, and engaged in a Due Process analysis, whereas four Members of this Court, consisting of the plurality, held the retroactive payment provision of the bill unconstitutional as violating the Takings Clause of the Fifth Amendment, *id.* at 503. Justice Kennedy concurred in the judgment, stating that the retroactive payment required by the legislation was invalid under Due Process principles, but rejected the plurality's Takings Clause analysis, *id.* at 539. *State ex rel. Shemo v. Mayfield Heights* presents this Court with a fact-specific proceeding, providing the Court with an opportunity not heretofore presented to shed light as to whether a governmental entity is required by the Takings

Clause of the Fifth Amendment to pay compensation by reason of an obsolete zoning regulation judicially declared as failing to substantially advance the public health, safety and welfare, or whether such a regulation is invalid because it offends the Due Process Clause, which historically has been the remedy. *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). In that case this Court upheld the comprehensive zoning code of the City of Euclid, Ohio, from the challenge that it violated the Due Process Clause of the Fourteenth Amendment. Justice Sutherland, writing for the Court, noted at page 395:

> It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

And, writing for the Court two years later, Justice Sutherland, in *Nectow v. Cambridge*, 277 U.S. 172 (1928), stated at page 188:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid v. Ambler Realty Co., supra*, p. 395. * * * That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities

> comes within the ban of the Fourteenth Amendment and cannot be sustained.

Shemo's challenge to the Mayfield Heights zoning regulation was not facial, but rather as applied. This Court has not approved a case in which compensation was ordered to be paid an owner who established that a land-use regulation diminishing the value of property failed to advance a legitimate governmental interest. Historically, this Court has applied the Due Process Clause of the Fourteenth Amendment and invalidated the legislation by reason thereof. This case presents the significant question of the applicability of the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the recurrent issue of the treatment of property burdened by an obsolete or errant land-use regulation that does not advance a legitimate governmental interest. It is readily apparent that resolution of that question is of significant importance to the states and their subdivisions.

II. The Fairness Doctrine

In recent years this Court has frequently relied upon its statement in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), relating to "fairness and justice" in determining the Takings Clause applicable to regulation of property. *Penn Central Transportation Company v. City of New York, supra*, at 123; *Eastern Enterprises v. Apfel, supra*, at 522; *Palazzolo v. Rhode Island, supra*, at 636; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra*, at 1484. Justice O'Connor elaborated on the assessments involved under the *Armstrong* rule in *Palazzolo v. Rhode Island, supra*, at 636 as follows:

Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra*, at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central, supra*, at 124, 98 S.Ct. 2646 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962)). The outcome instead "depends largely 'upon the particular circumstances [in that] case.'" *Penn Central, supra*, at 124, 98 S.Ct. 2646 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958)).

We have "identified several factors that have particular significance" in these "essentially ad

> hoc, factual inquiries." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646. Two such factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid.* Another is "the character of the governmental action." *Ibid.* The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127, 98 S.Ct. 2646 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property"); see also *Yee v. Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (Regulatory takings cases "necessarily entai[l] complex factual assessments of the purposes and economic effects of government actions"). *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

Except with respect to regulations that deny the owner all beneficial use of property, as in *Lucas v. Carolina Coastal Council*, 505 U.S. 1003 (1992), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), this Court has not approved categorical treatment in analysis of a regulation pursuant to the Takings Clause, as was held by the Ohio Supreme Court in this case. Justice O'Connor suggests categorical treatment is not appropriate for a use restriction that does not effect a substantial public purpose.

It is readily apparent that if the Takings Clause is to be applied to an unwarranted regulation, fairness and justice require further examination as identified in *Penn Central* and elaborated upon by Justice O'Connor in her concurring opinion in *Palazzolo*. This case demonstrates that categorical treatment is inappropriate.

In this case, the character of the Mayfield Heights action is, in fact, inaction. The single-family residential zoning on the Subject Property was in effect since 1927, until the court ordered rezoning in April, 2001. Neither the Trustees nor their predecessors petitioned the City to rezone the Subject Property. Instead, the Trustees filed an action in 1992 requesting the zoning as applied to the Subject Property be declared unconstitutional and suggesting zoning permitting multi-family development as appropriate. In 1995, they dismissed the case and without petitioning the City for rezoning, re-filed an identical complaint except suggesting that the appropriate zoning for the Subject Property was local retail and warehouse development. It is difficult to comprehend how fairness and justice require compensation and the application of the Takings Clause to a zoning regulation enacted 70 years ago without petition from the owners to rezone the property through the normal planning process. The importance of informed decision-making and the planning process were stressed by this Court in *Tahoe-Sierra, supra*, at 122 S.Ct. 1488. Furthermore, the Trustees, having elected to pursue the judicial process rather than the normal procedures for obtaining the change in zoning, should not benefit from the "normal delays in obtaining building permits, changes in zoning ordinance, variances, and the like," *Penn Central, supra*, at 482 U.S. 321.

When the Subject Property was acquired by the owners, it was vacant, undeveloped land platted as a single-family residential subdivision and requiring the investment of substantial monies for streets and other improvements. Just as this Court noted in *Tahoe-Sierra*, *supra*, at 122 S.Ct. 1489, that there is reason to believe property values often will continue to increase, so it might reasonably be expected that upon rezoning to a higher and better use, the value of property increases. In the previous decision in this case, the court noted that a Costco wholesale store was to occupy 75 percent of the retail space on the Subject Property. (App, *infra*, App. 23). It is highly unlikely that the Trustees suffered any economic harm, and likely that they are being rewarded far beyond their reasonable expectations.

In evaluating fairness and justice, consideration must be given to the fact that republican government is the centerpiece of the Constitution, weighing as heavily in the framers' minds as the Bill of Rights. The Federalist No. 9 (Alexander Hamilton). In praise of republican government, he stated:

> The science of politics, however, like most other sciences has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments – the introduction of legislative ballances and checks – the institution of courts composed of judges, holding their offices during good behaviour – the representation of the people in the legislature by deputies of their own election – these are either wholly new discoveries or have made their principal progress towards perfection in

> modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.

Id. at 38 (Bantam Edition 1988). The framers of the Constitution, Professor Treanor points out, limited the Takings Clause to provide compensation when the property taken was devoted to public use. See, William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia L.R. 782, 818 (1995), in which Professor Treanor points out:

> Rather, republicanism, which values the right to property but subjects it to majoritarian delineation, was also extremely influential. The power of the republican view of property during this period shows that there was no consensus among the framers that majoritarian decisionmakers could not be trusted to determine the appropriate level of protection for property interests.

Property interests were adequately protected in the early years of the Republic by due process concepts. *Van Horne's Lessee v. Dorrance*, 2 Dallas 304 (U.S. Dist. Ct. Pa. 1795).

In analyzing the fairness of extending the Takings Clause to a use regulation in effect for over 70 years, found to fail to substantially fulfill a public purpose, respect should be extended to legislative judgments which by their nature are debatable, are susceptible to numerous pressures, and are an essential foundation of our government. The owners of the Subject Property reasonably anticipated the process through which their goal was to be accomplished. They have reaped a substantial reward. It would not be fair to impose upon the taxpayers of Mayfield Heights a penalty because their elected officials did not

concur with the owners concerning the appropriate use of the Subject Property.

This Court noted in *Tahoe-Sierra, supra*, at 122 S.Ct. 1463, "[L]and-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford."

Fairness requires that legislative judgments not be subjected to categorical treatment even though not substantially advancing a legitimate governmental interest.

III. The Anomaly of a Taking Without Public Benefit

In that the Takings Clause presupposes a public benefit from governmental exaction, it logically follows that there can be no taking without a public use. In *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan, writing in dissent for himself and three other Justices of the Court, broached this suggestion at page 656, noting:

> Because the police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, (1926), it is axiomatic that the public receives a benefit while the offending regulation is in effect. If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it. The payment of

> just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

In footnote 23 on that page to that comment, he added:

> A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no "public use." Although the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless have a damages cause of action under 42 U.S.C. §1983 for a Fourteenth Amendment due process violation.

The appropriation of property by government must be for the devotion of the property to a public benefit; otherwise it is illegitimate and invalid. *Cincinnati v. Vester*, 281 U.S. 439 (1930); *Hawaii Housing Authority v. Midkiff*, *supra*, at 467 U.S. 241-243.

A majority of this Court apparently agree with Justice Brennan's analysis. Justice Kennedy, concurring in the judgment in *Eastern Enterprises v. Apfel*, *supra*, at 524 U.S. 545, noted:

> The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional:
>
> "As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit

> the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987) (emphasis and citations omitted).

Justice Breyer, writing for four Justices in dissent, pointed out at page 554:

> The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property . . . for public use, without just compensation." U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes "private property" to serve the "public" good.
>
> The "private property" upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. See, *e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). It requires compensation when the government takes that property for a public purpose.

It may be surmised that many land-use regulations throughout the country have become obsolete and do not substantially advance the public welfare, and also that local zoning authorities may enact land-use limitations held by a court to be arbitrary. The exposure to the public resources is frightening. A decision from this Court regarding the issues presented by this case is critical to local government throughout the country. Therefore, important

questions arise in connection with this case and the Petition should be granted.

IV. The Decision Below Conflicts With Decisions of the Supreme Courts of New Jersey, Pennsylvania, Rhode Island and Florida

The decision of the Ohio Supreme Court that an owner is entitled to compensation for a temporary taking during the time spent in invalidating an arbitrary zoning ordinance conflicts with the decisions of the Supreme Courts of New Jersey, Pennsylvania, Rhode Island and Florida. In *Pheasant Bridge Corporation v. Township of Warren*, 169 N.J. 282, 777 A.2d 334 (2001), the court held at page 336, "[W]e . . . reinstate the trial court's determination invalidating the zoning ordinance because it is arbitrary, capricious, and unreasonable as applied to plaintiff's property. We hold further that plaintiff has no cognizable claim that it experienced a temporary taking during the period in which it successfully challenged the ordinance." The court held at 169 N.J. 286, 777 A.2d 336, "[A] *per se* compensable taking does not occur as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority."

In *Miller and Son Paving, Inc. v. Plumstead Township, Bucks County*, 552 Pa. 652, 717 A.2d 483 (1998), the court held at 552 Pa. 653, 717 A.2d 484, "[F]or the reasons that follow, we . . . hold that a per se compensable taking does not result from a zoning ordinance which is ultimately declared invalid."

In *Brunelle v. Town of South Kingstown*, 700 A.2d 1075 (R.I. 1997), the court disposed of the landowner's

Fifth Amendment takings claim at 700 A.2d 1081, stating, "[H]e maintains that the period during which defendants refused to rezone his parcel until ordered to do so by the Superior Court in December 1990 was a sufficient governmental interference with his property so as to amount to a taking. We disagree."

In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*, 640 So.2d 54 (Fla. 1994), the court explained at 640 So.2d 57:

> Thus, it is evident that while both constitutional theories involve "takings" and "police power," the analysis under due process is different from the analysis under just compensation. Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation. In situations where state action is declared an improper exercise of police power under due process, the regulation is simply declared unconstitutional.
>
> Therefore, a land use regulation can be held facially unconstitutional without a finding that there was an uncompensated taking.

This Court has not had a fact-specific situation enabling it to review arbitrary, invalid land-use regulation with respect to the Takings Clause. It should grant this Petition and resolve the subject and the conflict in the interpretation of the Takings Clause between the Supreme

Court of Ohio and the courts of New Jersey, Pennsylvania, Rhode Island and Florida.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD F. CARR, ESQ.
(#0029884)
Counsel of Record
L. BRYAN CARR, ESQ.
(#0066649)
1392 SOM Center Road
Mayfield Heights, Ohio 44124
Telephone: 440-473-2277
Facsimile: 440-473-0166

ANTHONY J. COYNE, ESQ.
(#0039605)
BRUCE G. RINKER, ESQ.
(#0017493)
ELI MANOS, ESQ.
(#0006468)
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
Telephone: 216-523-1500
Facsimile: 216-523-1705

Counsel for Petitioner

APPENDIX

Opinion of the Supreme Court of Ohio dated April 10, 2002, *State ex rel. Shemo v. Mayfield Heights*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002)..... App. 1

Opinion of the Supreme Court of Ohio dated August 8, 2001, *State ex rel. Shemo v. Mayfield Heights*, 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001)..... App. 20

Opinion of the Supreme court of Ohio dated July 18, 2001, *State ex rel. Shemo v. Mayfield Heights*, 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001)..... App. 30

Opinion of the Supreme Court of Ohio dated February 9, 2000, Shemo v. Mayfield Heights, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000)..... App. 34

Order of the Supreme Court of Ohio granting reconsideration in part dated October 2, 2002, State ex rel. Shemo v. Mayfield Heights, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002) ..... App. 46

Opinion of the Court of Appeals for the Eighth Appellate District dated August 20, 1998, Michael A. Shemo, Co-Trustee, et al. v. City of Mayfield Heights, Ohio, et al., Case No. 73241..... App. 56

Opinion of the Court of Appeals for the Eighth Appellate District dated April 3, 1997, Michael A. Shemo, Co-Trustee, et al. v. City of Mayfield Heights, Ohio, et al., Case No. 70715..... App. 62

Final Judgment Entry of the Cuyahoga County Court of Common Pleas dated September 2, 1997, Michael A. Shemo, Co-Trustee, et al. v. City of Mayfield Heights, Ohio, et al., Case No. CV-291595..... App. 65

APPENDIX - Continued

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Opinion of the Cuyahoga County Court of Common Pleas dated May 16, 1996, Michael A. Shemo, Co-Trustee, et al. v. City of Mayfield Heights, Ohio, et al., Case No. CV-291595 ..... App. 67

THE STATE EX REL. SHEMO ET AL. *v.* CITY OF MAYFIELD HEIGHTS ET AL.

[Cite as *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59.]

Mandamus sought to compel city of Mayfield Heights et al. to commence appropriation proceedings to detrmine the amount for the city's temporary taknig or relator's property – Writ granted, when.

(No. 01-1325 – Submitted February 5, 2002 – Decided April 10, 2002.)

IN MANDAMUS.

Per Curiam. Relators, Michael A. Shemo and Larry Goldberg, are co-owners as trustees of a 22.6-acre parcel of land in respondent city of Mayfield Heights. Relators acquired the parcel in January 1992.

On March 19, 1992, relators filed a complaint in the Cuyahoga County Court of Common Pleas, naming Mayfield Heights and the Ohio Attorney General as defendants. Relators requested a declaratory judgment that the existing U-1(1) Single-Family House District zoning classification unconstitutionally restricted the use of the property to single-family residential development. Relators initially wanted the property rezoned to permit midrise, multifamily development.

In June 1995, relators voluntarily dismissed the declaratory judgment action and refiled it. Relators again requested a judgment declaring that the U-1(1) zoning classification was unconstitutional as applied to their property. This time, however, relators requested that the property be rezoned to U-4 Local Retail and Wholesale

District so that retail and warehouse development would be permitted. Relators alleged that the U-1(1) zoning classification denied them an economically viable use of the property without substantially advancing a legitimate interest in the health, safety, or welfare of Mayfield Heights.

In December 1995, relators and Mayfield Heights stipulated that the U-1(1) zoning classification as applied to relators' property was invalid. Over relators' objection, the city rezoned the property to U-2-A Planned Unit Development District, which restricted the use of the property to attached and detached single-family residential dwellings. Relators then challenged the constitutionality of this new classification in their pending declaratory judgment action.

In May 1996, following a trial, the common pleas court held that the U-2-A zoning classification was unconstitutional as applied to relators' property. The common pleas court found that the U-2-A zoning classification did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights and that the U-2-A zoning rendered the property economically nonviable.

In September 1997, on remand from the court of appeals, the common pleas court entered a judgment incorporating its May 1996 declaration that the U-2-A zoning classification was unconstitutional as applied to the property and held that relators' proposed retail use of the property, as described in their site plan, was reasonable. The common pleas court ordered that relators make the improvements to Golden Gate Boulevard specified in their site plan, that Mayfield Heights take actions to facilitate these road improvements, that the city and municipal

officers named as defendants be enjoined from interfering with relators' proposed retail use of the property and installation of the road improvements, and that the city and the individual defendants allow retail development and use consistent with the court's judgment.

On appeal, the court of appeals vacated the common pleas court judgment and remanded the cause for further determination. On further appeal, we reversed the judgment of the court of appeals and reinstated the September 1997 common pleas court judgment. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 722 N.E.2d 1018 (*"Shemo I"*). In so holding, we stated that "[s]ince [relators] have shown that the city lacks any legitimate governmental health, safety, and welfare concerns in support of the U-2-A zoning classification, we find that the trial court was correct in declaring the U-2-A zoning ordinance unconstitutional." *Id.* at 13, 722 N.E.2d at 1024. We also found that competent, credible evidence supported the common pleas court's conclusions that the property was not suitable for residential use and that relators' proposed commercial use of the property was reasonable. *Id.* at 12-13, 722 N.E.2d 1018.

In August 2000, Mayfield Heights enacted an ordinance in which it claimed ownership of certain unimproved streets located on relators' property and authorized the mayor to sell these "paper streets." These streets had been dedicated to the city in June 1927, but had never been constructed. After Mayfield Heights accepted the dedication of an adjacent subdivision in 1959, the paper streets were blocked from access to actual streets. The city did not claim ownership of the paper streets during the declaratory judgment proceeding even though there was testimony and evidence concerning them during that proceeding.

Relators subsequently filed a common pleas court action to enjoin the sale of the paper streets and to declare that they had been abandoned by the city or, if not abandoned, to declare them vacated under R.C. 723.09. In December 2000, the parties resolved that case by consent and agreed that the paper streets were vacated and that relators were declared the owners of the property that contained the paper streets.

In March 2001, relators applied to respondent Mayfield Heights Planning and Zoning Commission for road improvements consistent with the common pleas court judgment reinstated by this court in *Shemo I.* The development also required a modification of an easement by an adjacent property owner for a new access drive. The city council initially disregarded the property owner's application for an improvement to modify the easement because it found that relators were unable to demonstrate either that they had obtained a wetlands permit for the property or that no permit was required. No city ordinance, however, authorized the planning commission or city council to deny building permits based upon environmental regulations.

In April 2001, the planning commission approved the application for modification of the easement, but it refused to completely approve relators' road improvement plans, instead restricting the use of Maplewood Road, which provides access to the proposed retail development, to emergency use. The city council confirmed the decision of the planning commission. As required by *Shemo I,* the city rezoned relators' property from U-2-A to U-4 in April 2001.

On May 16, 2001, relators filed a complaint in this court against respondents, Mayfield Heights and its mayor, city council, and planning commission. Relators

requested a writ of mandamus to compel respondents to grant final approval of their road improvement plans, including unrestricted, nonemergency access to Maplewood Road, in accordance with the September 1997 common pleas court judgment reinstated by this court in *Shemo I.* Relators also requested a writ of mandamus to compel the city to commence appropriation proceedings in the Cuyahoga County Common Pleas Court, Probate Division, to determine the amount of the city's alleged regulatory taking of relators' property.

In July 2001, we dismissed without prejudice relators' mandamus action because they had failed to fully comply with the affidavit requirement of S.Ct.Prac.R. X(4)(B). *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324, 750 N.E.2d 167 (*"Shemo II"*).

On July 23, 2001, relators refiled their mandamus action, which fully complied with S.Ct.Prac.R. X(4)(B). On relators' motion, we expedited our consideration of relators' mandamus claim relating to their road improvement plans for the proposed retail development. Upon consideration, we granted a peremptory writ of mandamus to compel respondents to approve relators' road improvement plans in connection with the proposed retail development. This included unrestricted access to and from Maplewood Road once the specified conditions are met, except for vehicles weighing over ten thousand pounds, and granting all other approvals and permits necessary for the retail development of the property ordered by the common pleas court's September 2, 1997 judgment. *State ex rel. Shemo v. Mayfield Hts.* (2001), 93 Ohio St.3d 1, 752 N.E.2d 854 (*"Shemo III"*). On August 20, 2001, the city council enacted a resolution consistent with *Shemo III* by removing the emergency-use restriction for Maplewood Road.

We subsequently granted an alternative writ and issued a schedule for the presentation of evidence and briefs on relators' remaining mandamus claim. *State ex rel. Shemo v. Mayfield Hts.* (2001), 93 Ohio St.3d 1431, 755 N.E.2d 354. Relators introduced evidence that "[a]s a direct consequence of the City's unlawful enforcement of its U-1(1) and U-2A residential zoning against [the] Property and the City's failure to comply with the Trial Court's Judgment set forth above, [relators] have been deprived of the use of [their] Property from March 19, 1992 until August 20, 2001." In addition, respondents' actions delayed construction of a store to be built on the property as part of the development plan from the summer of 2001 until the spring of 2002.

This cause is now before the court to consider relators' claim for a writ of mandamus to compel appropriation proceedings as well as respondents' request for oral argument.

Respondents' Request for Oral Argument

Respondents request oral argument because, among other reasons, it will afford the parties the opportunity "to focus upon the significant issues" and will "enhance a thorough understanding and appreciation of the case."

We have resolved comparable takings cases without the necessity of oral argument. See, *e.g.*, *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 529, 751 N.E.2d 1032; *State ex rel. Painesville v. Lake Cty. Bd. of Commrs.* (2001), 93 Ohio St.3d 566, 569, 757 N.E.2d 347, 351.

Based on the foregoing, we deny respondents' request and proceed to the merits of relators' mandamus claim.

Mandamus – Appropriation – Compensable Taking

Relators request a writ of mandamus to compel respondents to commence appropriation proceedings for the city's temporary taking of their property.

The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution. Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St.3d at 533, 751 N.E.2d 1032. Relators have the burden of proving their entitlement to the requested extraordinary relief in mandamus. *Id.*

We must first determine whether relators have established a compensable taking of their property.

The United States Supreme Court has consistently held that "application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" See *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126, 106 S.Ct. 455, 88 L.Ed.2d 419, quoting *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 485, 107 S.Ct. 1232, 94 L.Ed.2d 472.

We have also adopted this test for a taking caused by a zoning law. See *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 211, 690 N.E.2d 510, quoting *Agins,* 447 U.S. at 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 ("'The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land * * *'").

This test is disjunctive, *i.e.,* a compensable taking can occur *either* if the application of the zoning ordinance to the particular property is constitutionally invalid, *i.e.,* it does not substantially advance legitimate state interests, *or* denies the landowner all economically viable use of the land. Although in previous cases we have applied the test in a conjunctive fashion, those cases involved merely challenges to the constitutionality of these ordinances and did not involve takings claims. See, *e.g., Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, syllabus, modified in part in *Goldberg,* 81 Ohio St.3d 207, 690 N.E.2d 510, syllabus. Similarly, although some of our language in *Goldberg* could be construed to specify that both of the *Agins* prongs must be met in order to constitute a compensable taking, see 81 Ohio St.3d at 211, 213, 690 N.E.2d 510, this language is dicta because the landowner in *Goldberg* did not claim that the application of the challenged zoning regulation to its property constituted a taking.

We now clarify that satisfaction of either prong of the *Agins* test establishes a taking. We implicitly recognized this in *BSW Dev. Group v. Dayton* (1998), 83 Ohio St.3d 338, 343, 699 N.E.2d 1271, where we noted that "*given BSW's failure to properly raise any constitutional issue of*

whether the Dayton historic preservation ordinances substantially advance legitimate state interests * * * BSW could only establish entitlement to appropriation proceedings if it established that appellees' denial of the demolition permit denied BSW all economically viable use of the Wilcon Building property." (Emphasis added.) More important, this clarification comports with the plain language of the *Agins* test. In other words, "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred * * * "[1] *Palazzolo v. Rhode Island* (2001), 533 U.S. 606, 617, 121 S.Ct. 2448, 2457, 150 L.Ed.2d 592, 607.

Relators claim that they have established a taking because they have satisfied either prong of the *Agins* disjunctive test. It is evident that relators have satisfied the first prong, *i.e.*, the application of the U-1(1) and U-2-A zoning classifications to their property was unconstitutional in that the application of these classifications did not substantially advance legitimate state interests. The parties stipulated that the U-1(1) zoning classification as applied to relators' property was unconstitutional, and the common pleas court found, in the declaratory judgment

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[1] For state appellate cases expressing confusion over whether the test is conjunctive or disjunctive, see *Rumpke Rd. Dev. Corp. v. Union Twp. Bd. of Trustees* (1996), 115 Ohio App.3d 17, 684 N.E.2d 353; *MDJ Properties v. Union Twp. Bd. of Trustees* (Mar. 27, 2000), Clermont App. Nos. CA99-02-013 and CA99-02-019, unreported, 2000 WL 313502; *James Place Properties, Inc. v. Madison Twp. Bd. of Trustees* (Sept. 25, 1998), Lake App. No. 97-L-143, unreported, 1998 WL 682347; cf. *Wilson v. Union Twp. Trustees* (Oct. 26, 1998), Clermont App. No. CA98-06-036, unreported, 1998 WL 744089, holding that *Goldberg* adopted the *Agins* disjunctive test for takings claims.

reinstated by this court in *Shemo I,* that the U-2-A zoning classification was also unconstitutional because, as applied to relators' property, it did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights. Respondents are collaterally estopped from asserting otherwise. See *State v. Bey* (1999), 85 Ohio St.3d 487, 491, 709 N.E.2d 484, quoting *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917 ("'Collateral estoppel [issue preclusion] prevents parties * * * from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit'").

It is less clear whether relators satisfied the second prong of the *Agins* test, *i.e.,* that the application of the U-1(1) and U-2-A zoning classifications to their property denied them all economically viable use of their land. In this regard, our judgment in *Shemo I,* which reinstated the common pleas court's September 1997 declaratory judgment, did not determine this issue. Although in *Shemo I* we concluded that relators introduced competent, credible evidence supporting the declaration that the property was not suitable for residential use, that does not necessarily mean that no economically viable use remained upon the application of the unconstitutional zoning classifications. And even though relators' evidence in this mandamus action states that the U-1(1) and U-2-A residential zoning deprived them of "*the use* of [their] Property," it does not specify that it deprived them of *all economically viable use* of their property. (Emphasis added.) Relators therefore did not establish the second prong of the *Agins* test.

Nevertheless, because relators need to establish only one prong of the *Agins* disjunctive test in order to prove a taking, their satisfaction of the first prong is sufficient.

The U-1(1) and U-2-A single-family residential zoning classifications were unconstitutionally applied to relators' property, and the property was, in fact, not suitable for this residential use. Therefore, relators have proved a taking of their property.

Effect of Existence of Contested Zoning at the Time of Acquisition on Takings Claim

Respondents contend that there can be no taking because the challenged single-family residential zoning existed at the time relators acquired the property and respondents did not further restrict the preexisting residential use of the property after relators' acquisition of it.

Respondents' contention lacks merit. The United States Supreme Court recently rejected a similar argument that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted land restriction and is barred from claiming that it effects a taking:

"The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. * * * So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

"The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and

land-use restrictions. * * * The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. *Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.*

"Nor does the justification of notice take into account the effect on owners at the time of [the] enactment, who are prejudiced as well. * * * The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. *A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.*" (Emphasis added and citations omitted.) *Palazzolo,* 533 U.S. at 626-628, 121 S.Ct. at 2462-2463, 150 L.Ed.2d at 613-614.

Respondents' reliance on cases like *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452, 613 N.E.2d 580, and *Singer v. Fairborn* (1991), 73 Ohio App.3d 809, 598 N.E.2d

806, is misplaced. *Community Concerned Citizens* involved a challenge to an administrative denial of a conditional-use permit rather than a takings claim premised on the unconstitutional application of a zoning ordinance. And in *Singer,* the landowner challenged a city's denial of his request for rezoning rather than the constitutionality of the ordinance itself. 73 Ohio App.3d at 815, 598 N.E.2d 806.

Effect of Invalidation of Challenged Zoning Ordinances on Takings Claim

Respondents next assert that once the zoning ordinances were invalidated as applied to relators' property, the case is terminated and relators are not entitled to compensation for the period that the unconstitutional ordinances were applied to the property. Respondents cite our following statement from *Goldberg,* 81 Ohio St.3d at 213, 690 N.E.2d 510:

"If the landowner has challenged the constitutionality of zoning and also alleged that it constitutes a taking of the property, the case is terminated if the zoning is found to be unconstitutional, because the landowner is free of the zoning that restricted the use of the land."

Respondents' contention is meritless. The cited dicta did not consider the possibility of a claim for temporary taking because the landowner therein did not claim a taking. *Id.,* 81 Ohio St.3d at 213, 690 N.E.2d 510.

More important, the United States Supreme Court has declared that temporary takings are compensable:

"Once a court determines that a taking has occurred, the government retains the whole range of options already

available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, 'permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain. . . .' * * * We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (Ellipsis *sic.*) *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles* (1987), 482 U.S. 304, 321, 107 S.Ct. 2378, 96 L.Ed.2d 250.

Although *First English* involved the second prong of the *Agins* takings test rather than the first prong, its holding "still contains nuggets of language helpful to resolution of some other inverse condemnation issues not directly addressed." See, generally, 8 Rohan & Reskin, Nichols on Eminent Domain (3 Ed.2001) 14E-22, Section 14E.04. In other words, "[t]he *First English* court stated that damages from 'temporary' takings, that is, resulting from interim ordinances, or presumably, from ordinances intended to be permanent but later invalidated by the courts as a taking and therefore effectively transformed into an interim ordinance, are to be 'measured by the principles normally governing the taking of a right to use property temporarily,' that is, in the same way as in eminent domain actions for temporary use of property." (Footnote omitted.) *Id.* at 14E-23, Section 14E.04[2], quoting *First English,* 482 U.S. at 318, 107 S.Ct. 2378, 96 L.Ed.2d 250.

Therefore, the invalidation of the U-1(1) and U-2-A residential zoning ordinances as applied to relators'

property did not relieve respondents of their duty to compensate relators for the temporary taking of their property. When the burden on the landowner "results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. * * * Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English,* 482 U.S. at 319, 107 S.Ct. 2378, 96 L.Ed.2d 250.

Delays in Use; Paper Streets

Respondents claim that relators were not entitled to compensation because they were not prepared to make the required access road improvements for retail use as authorized by the court until March 2001, when they submitted their road improvement plans to Mayfield Heights, and relators did not address a wetlands issue concerning their development of property until November 2000.

The United States Supreme Court emphasized in *First English* that it expressed no opinion on "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" in regulatory inverse condemnation cases. 482 U.S. at 321, 107 S.Ct. 2378, 96 L.Ed.2d 250.

Respondents here, however, applied unconstitutional zoning classifications to relators' property for over nine years after relators acquired the property. Any delays by relators did not contribute to respondents' delay in finally

rezoning the property to U-4. In fact, as established by relators, there was never a substantive wetlands issue.

Respondents further claim that there is no compensable taking because the city owned "paper streets" until the December 2000 consent entry vacating the streets and declaring relators the owners of the property. The evidence, however, establishes that Mayfield Heights abandoned the paper streets long before the taking of the property here.

The land constituting the paper streets was dedicated to the city in 1927. Once land is dedicated, it is held in trust for street or alley purposes and reverts to the grantor or those claiming under the grantor when it is abandoned or vacated. See, *e.g.*, *State ex rel. Bedard v. Lockbourne* (1990), 69 Ohio App.3d 452, 457, 590 N.E.2d 1327; *Chillicothe Bowling Lanes, Inc. v. Kitchen Collection, Inc.* (Aug. 15, 1995), Ross App. No. 94CA2066, unreported, 1995 WL 495959. Nonuse of the property, *i.e.*, ceasing all acts of enjoyment on the property, must occur for at least twenty-one years in order to constitute abandonment. *Nail & Iron Co. v. Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639, paragraph two of the syllabus; *Anderson v. Alger* (May 14, 1999), Hardin App. No. 6-98-10, unreported, 1999 WL 378377. The city never constructed or used the paper streets here.

In fact, when Mayfield Heights accepted the dedication of an adjacent subdivision in 1959, access to these never-constructed streets from actual streets was blocked. The city's 1959 acceptance of this dedication consequently evinced its intent to abandon the paper streets, and its nonuse of these streets continued for over the requisite

twenty-one-year period before the taking here. See *Anderson,* citing *Wyatt v. Ohio Dept. of Transp.* (1993), 87 Ohio App.3d 1, 5, 621 N.E.2d 822, regarding the requirement of an intent to abandon. Therefore, relators owned the property consisting of the "paper streets" at the time the temporary taking occurred because the city had abandoned the property.

Res Judicata

Respondents finally argue that *res judicata* bars relators' takings claim because relators could have raised their takings claim in their declaratory judgment action, which was the subject of *Shemo I.* Respondents are correct that *res judicata* generally bars litigation of all claims that either were or *might have been* litigated in a first lawsuit. *State ex rel. Carroll v. Corrigan* (2001), 91 Ohio St.3d 331, 332, 744 N.E.2d 771.

Unlike other judgments, however, and consistent with the persuasive weight of authority, a declaratory judgment is not *res judicata* on an issue or claim not determined thereby even though it was known and existing at the time of the original action. See *Jamestown Village Condo. Owners Assn. v. Market Media Research, Inc.* (1994), 96 Ohio App.3d 678, 685-687, 645 N.E.2d 1265. Thus, a declaratory judgment determines only what it actually decides and does not preclude other claims that might have been advanced. 1 Restatement of the Law 2d, Judgments (1982) 337, Section 33, Comment *c*; *Ketchel v. Bainbridge Twp.* (1992), 79 Ohio App.3d 174, 177-178, 607 N.E.2d 22.

Therefore, relators' failure to raise their takings claim in their previous declaratory judgment action does not bar their takings claim in this mandamus proceeding.

Temporary Taking – Duration and Measure of Damages

Relators request compensation for the period from March 19, 1992, when they filed a declaratory judgment action challenging the existing U-1(1) zoning classification, until August 20, 2001, when the city council enacted a resolution removing the emergency-use restriction for one road providing access to the proposed retail development.

Under the first prong of the *Agins* test, relators established a temporary taking during the time that the U-1(1) and U-2-A zoning classifications were unconstitutionally applied to their property. These single-family residential classifications were applied to their property on March 19, 1992, the date they claim as the beginning date of the temporary taking. But the zoning classifications had been invalidated and the requested zoning, U-4, was applied by Mayfield Heights to their property in April 2001. Although the Maplewood Road emergency-use restriction was not removed until August 2001, April 2001 is the ending date for the temporary taking because the challenged zoning regulations no longer applied to relators' property. And relators did not establish that they were denied *all* economically viable use for their property under the second prong of the *Agins* test after the rezoning in April 2001.

For the measure of damages, relators are entitled to the diminution in the value of the use of their property during the period of the temporary taking. See *Norwood v.*

Sheen (1933), 126 Ohio St. 482, 494, 186 N.E. 102; *First English*, 482 U.S. at 319, 107 S.Ct. 2378, 96 L.Ed.2d 250.

Conclusion

Based on the foregoing, relators have established their entitlement to the requested extraordinary relief in mandamus to compel respondents to commence appropriation proceedings to determine the amount of the city's temporary taking of relators' property. Therefore, we grant the writ.

Writ granted.

MOYER, C.J., RESNICK, COOK and LUNDBERG STRATTON, JJ., concur.

F.E. SWEENEY AND PFEIFER, JJ., concur but would also award attorney fees.

Douglas, J., concurs in judgment.

Kahn, Kleinman, Yanowitz & Arnson Co., L.P.A., Sheldon Berns and *Benjamin J. Ockner*, for relators.

Leonard F. Carr and *L. Bryan Carr, Calfee, Hatler & Griswold, L.L.P.*, and *Phillip J. Campanella*, for respondents.

THE STATE EX REL. SHEMO ET AL. *v.* CITY OF MAYFIELD HEIGHTS ET AL.

[Cite as *State ex rel. Shemo v. Mayfield Hts.* (2001), 93 Ohio St.3d 1.]

Municipal corporations – Zoning – Motion for expedited consideration of relator's mandamus claim to compel city of Mayfield Heights et al. to approve relators' application for road improvement plan granted – Motion for expedited consideration of relators' mandamus claim to compel appropriation proceedings denied – Peremptory writ of mandamus to compel respondents to approve relators' road improvement plans in connection with the proposed development of their property granted.

(No. 01-1325 – Submitted July 24, 2001 – Decided August 8, 2001.)

IN MANDAMUS.

ON MOTION FOR EXPEDITED CONSIDERATION AND FOR PEREMPTORY WRIT.

Per Curiam. Relators, Michael A. Shemo, Trustee, and Larry Goldberg, Trustee, are co-owners of an undeveloped parcel of land containing approximately twenty-two acres located in respondent city of Mayfield Heights. The property was zoned U-2-A, which is a classification for cluster single-family residences. On May 16, 1996, following a lengthy trial in an action for declaratory and injunctive relief brought by relators against Mayfield Heights and other municipal defendants, the Cuyahoga County Court of Common Pleas issued an order declaring the city's U-2-A zoning classification to be unconstitutional as applied to relators' property.

On September 2, 1997, the common pleas court entered a judgment incorporating its previous declaration and held that relators be "permitted to use and develop their Property generally consistent with the prepared Site Plan proposed by Keera [*sic*] Kekst * * * introduced into evidence at trial and consistent with the terms of the recorded deed restrictions * * * and recorded access easement (Plaintiffs' Exhibit 82)." The judgment authorized relators to use the property for their proposed retail use. The site plan provides for access to the property through Maplewood Road and an access driveway from Golden Gate Boulevard.

Under one of the recorded deed restrictions, "[n]o automobile traffic (except municipal law enforcement or emergency vehicles) shall be permitted to access to and from any retail building or use on the Property directly to, from or onto Maplewood Road unless and until [1] [the relators have] recorded an easement providing for automobile access to and from the Property and Golden Gate Boulevard across the retail zoned properties abutting the southerly boundary of the Property * * * , and [2] the road improvements for the Golden Gate Boulevard Access and related * * * improvements * * * have been completed." Another of the deed restrictions prohibits vehicles weighing over ten thousand pounds from accessing relators' property from Maplewood Road. Thus, once the Golden Gate Boulevard easement and access improvements have been completed, only the deed restriction regarding vehicle weight would apply to Maplewood Road.

The common pleas court further ordered in its September 2, 1997 judgment entry that relators make the improvements to Golden Gate Boulevard described in their site plan, that Mayfield Heights take any and all actions

to facilitate these road improvements, that the city and the other municipal defendants be enjoined from interfering with relators' proposed retail use of their property and installation of the road improvements, and that the city and the other defendants issue all approvals and permits to allow such retail development and use consistent with the court's judgment.

Subsequently, on appeal, the court of appeals vacated the common pleas court judgment and remanded the cause for further determination. On further appeal to this court, we reversed the judgment of the court of appeals and reinstated the judgment of the common pleas court. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 722 N.E.2d 1018 ("*Shemo I*"). In so holding, we rejected the city's contention that the common pleas court erred in failing to hold that decreasing traffic congestion is a legitimate governmental concern in part because relators "have also proposed to limit direct access from their property to the residential streets to cases of emergency only." *Id.*, 88 Ohio St.3d at 12, 722 N.E.2d at 1023. We did not, however, modify the common pleas court's judgment. *Id.*, 88 Ohio St.3d at 14, 722 N.E.2d at 1025.

In April 2001, the committee to re-elect respondent Mayfield Heights Mayor Margaret A. Egensperger circulated a campaign flier noting that neither the city nor its residents wanted the proposed development and that the Ohio "Supreme Court Justices hold the sole blame for this fiasco." The flier also contained statements that respondents Mayor Egensperger and city council would not open Maplewood Road to through traffic except for emergency vehicles and that "only the Supreme Court can open Maplewood Road to full traffic." (Capitalization and emphasis omitted.)

On April 16, 2001, respondent Mayfield Heights Planning Commission voted to approve a preliminary site plan in connection with relators' proposed development, but, over relators' objections, without Maplewood Road access other than for emergency purposes. At the planning commission meeting, Mayor Egensperger stated, "I have no problem opening Maplewood for emergency traffic only, but until the Supreme Court comes back and says the City of Mayfield Heights will open Maplewood, as far as I'm concerned, we will not open it."

Relators' development plan includes a Costco Wholesale ("Costco") store that will occupy seventy-five percent of the retail space on the property. Unless respondents approve relators' road improvement plans, which include general access to the development from Maplewood Road, Costco will cancel its plans for a store on the property and relators may suffer irreparable harm.

On April 23, the city council confirmed the decision of the planning commission. On May 7, the planning commission gave final approval to the site plan as amended to limit Maplewood Road traffic to relators' property to emergency traffic. On May 14, the city council confirmed the planning commission's final approval of the project as amended.

On May 16, relators filed a complaint in this court against respondents, Mayfield Heights and its mayor, city council, and planning commission. Relators requested a writ of mandamus to compel respondents "to grant final approval of Relators' Road Improvement Plans [in connection with the proposed development], including unrestricted access to and from Maplewood Road except for vehicles weighing more than [ten thousand pounds], to

grant all other approvals and permits necessary for the retail development of the Property," and to commence appropriation proceedings in the Cuyahoga County Common Pleas Court, Probate Division, to determine the amount of the city's alleged regulatory taking of relators' property. Relators' complaint contained a verification by relator Shemo, but Shemo did not specify in his verification that the allegations of his complaint were based on his personal knowledge. Relators also filed a motion for a peremptory writ. On May 17, relators filed a motion for expedited consideration of their motion for peremptory writ. Respondents subsequently filed a motion to dismiss, and relators filed a memorandum in opposition to the dismissal motion.

On July 18, 2001, we dismissed without prejudice relators' mandamus action because they failed to fully comply with the affidavit requirement of S.Ct.Prac.R. X(4)(B). *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324, 750 N.E.2d 167 ("*Shemo II*").

On July 23, 2001, relators refiled their mandamus action, which now fully comports with S.Ct.Prac.R. X(4)(B).

This cause is now before the court upon relators' motions for expedited consideration and for a peremptory writ.

Motion to Expedite

We generally await a response before determining entitlement to the requested extraordinary writ. See S.Ct.Prac.R. X(5). See, also, *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000),

88 Ohio St.3d 447, 449, 727 N.E.2d 900, 902. But under S.Ct.Prac.R. XIV(4)(C), we can act sooner if "the interests of justice warrant immediate consideration." See *State ex rel. Taft-O'Connor '98 v. Franklin Cty. Court of Common Pleas* (1998), 83 Ohio St.3d 487, 488, 700 N.E.2d 1232, 1233.

This case warrants expedited consideration of relators' claim for a writ of mandamus to compel respondents to grant final approval of its road improvement plans and to grant all other approvals and permits necessary for the retail development of the property. Relators have challenged respondents' attempts to prohibit their retail use of the property for over five years, and over a year ago, we reinstated the September 1997 common pleas court judgment they seek to enforce. *Shemo I,* 88 Ohio St.3d 7, 722 N.E.2d 1018. In fact, as relators assert, the city's unconstitutional zoning of their property has allegedly deprived them of the viable economic use of the property for over nine years.

In the interim, relators' prospective primary tenant, Costco, may withdraw and destroy the proposed retail development approved by the court, and respondents have noted that they will provide access for nonemergency vehicles to the property through Maplewood Road only if we order them to do so.

Under these unique circumstances, we grant relators' motion for expedited consideration concerning their first mandamus claim to compel respondents to approve relators' application for approval of the road improvement plans. Their second mandamus claim, to compel appropriation proceedings, however, does not warrant similar expedited treatment. In other words, relators' arguments

supporting expedited treatment of their first claim do not support expedited consideration of their second claim, which ultimately relates to potential damages from respondents' alleged deprivation of the economic viable use of their property since March 1992. We will consider this claim in the normal process. See S.Ct.Prac.R. X(5).

Therefore, we grant relators' motion for expedited consideration of their motion for a peremptory writ for their first claim and deny the motion as it relates to their second claim.

Motion for Peremptory Writ

Relators request a peremptory writ of mandamus. If it appears beyond doubt that relators are entitled to the requested extraordinary relief, a peremptory writ should issue. *State ex rel. Stern v. Mascio* (1998), 81 Ohio St.3d 297, 298, 691 N.E.2d 253, 254.

Relators are entitled to the requested writ. Contrary to respondents' position, as reflected above, we did not modify the common pleas court's September 1997 judgment; instead, we reinstated the judgment. *Shemo I,* 88 Ohio St.3d at 14, 722 N.E.2d at 1025. Under that judgment, which incorporates the site plan and deed restrictions, once the recordation of an easement providing for automobile access to the development from Golden Gate Boulevard and improvements for the Golden Gate Boulevard access are completed, the only limitation on access to the property through Maplewood Road is the prohibition against vehicles weighing over ten thousand pounds. By restricting approval of relators' site plan to *forever* limit Maplewood Road traffic to relators' property to emergency

traffic, respondents acted contrary to the common pleas court's September 1997 judgment.

A writ of mandamus will not be issued if there is a plain and adequate remedy in the ordinary course of the law. R.C. 2731.05; *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.* (2000), 90 Ohio St.3d 55, 64, 734 N.E.2d 811, 820. "In order for an alternative remedy to constitute an adequate remedy at law, it must be complete, beneficial, and speedy." *State ex rel. Natl. Electrical Contractors Assn., Ohio Conference v. Ohio Bur. of Emp. Serv.* (1998), 83 Ohio St.3d 179, 183, 699 N.E.2d 64, 67.

Respondents have previously contended in *Shemo II* that relators have an adequate remedy by a motion in the common pleas court to enforce that court's September 1997 judgment. And, as respondents noted at that time, in general, "[t]he use of mandamus to enforce a judgment is not popular and widespread because other avenues of enforcement [*e.g.*, motion for contempt] are readily available." *Hunt v. Westlake City School Dist. Bd. of Edn.* (1996), 114 Ohio App.3d 563, 568, 683 N.E.2d 803, 806; see, also, *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 252, 648 N.E.2d 1355, 1357 ("The court that issued the order sought to be enforced is in the best position to determine if that order has been disobeyed").

Nevertheless, a motion to enforce the common pleas judgment would be inadequate here because respondents erroneously rely on language from our 2000 judgment reinstating the common pleas court judgment and they have specified that they will not abide by the trial court judgment unless we order them to do so. Given the lengthy litigation that this dispute has already engendered, relegating relators to a motion in the trial court and yet

another appellate process would not be sufficiently speedy. Even if relators were to prevail on such a motion in the common pleas court, respondents could stay the judgment without posting bond pending its resolution on appeal. See *State ex rel. Ocasek v. Riley* (1978), 54 Ohio St.2d 488, 8 O.O.3d 466, 377 N.E.2d 792.

It appears beyond doubt that relators do not have an adequate remedy in the ordinary course of law to enforce the trial court's September 1997 judgment. Therefore, relators are entitled to the requested relief on their first claim, and we grant a peremptory writ of mandamus to compel respondents to approve relators' road improvement plans in connection with the proposed development, including unrestricted access to and from Maplewood Road once the conditions included in the deed restrictions are met, except for vehicles weighing more than ten thousand pounds, and to grant all other approvals and permits necessary for the retail development of the property ordered by the common pleas court's September 2, 1997 judgment.[1]

Judgment accordingly.

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[1] This constitutes a judgment entry and a decision on the merits relating to the first claim for purposes of S.Ct.Prac.R. XI. We find that there is no just reason for delay. See Civ.R. 54(B) ("When more than one claim for relief is presented in an action * * * , the court may enter final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay"); S.Ct.Prac.R. X(2) ("All original actions shall proceed under the Ohio Rules of Civil Procedure, unless clearly inapplicable").

MOYER, C.J., RESNICK, F. E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

DOUGLAS, J., dissents but would grant an alternative writ as to both claims.

Kahn, Kleinman, Yanowitz & Arnson Co., L.P.A., *Sheldon Berns* and *Benjamin J. Ockner*, for relators.

THE STATE EX REL. SHEMO, TRUSTEE, ET AL.
***v.* CITY OF MAYFIELD HEIGHTS ET AL.**

[Cite as *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324.]

Mandamus sought to compel city of Mayfield Heights et al. to approve relators' application for road improvement plans – Motion for expedited consideratoin granted – Motion for peremptory writ denied and cause dismissed without prejudice.

(No. 01-929 – Submitted May 30, 2001 – Decided July 18, 2001.)

IN MANDAMUS.

ON MOTION FOR EXPEDITED CONSIDERATION.

On consideration of relators' motion for expedited consideration of their motion for peremptory writ,

IT IS ORDERED that the motion for expedited consideration be, and hereby is, granted.

IT IS FURTHER ORDERED that relators' motion for peremptory writ be, and hereby is, denied, and that the cause be, and hereby is, dismissed without prejudice for failure to comply with S.Ct.Prac.R. X(4)(B).

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY and COOK, JJ., concur.

PFEIFER, J., concurs separately.

LUNDBERG STRATTON, J., dissents, would grant the peremptory writ, and concurs in the syllabus in the analysis

of the nature of the defect in relators' complaint found in the concurring opinion of Pfeifer, J.

PFEIFER, J., concurring. I concur in the judgment denying relators' motion for peremptory writ and in the dismissal of the cause without prejudice. I write separately, however, to specify the nature of the defect in relators' complaint in order to limit its recurrence in this and future cases.

Relators failed to comply with S.Ct.Prac.R. X(4)(B), which requires that "[a]ll complaints * * * shall be supported by an affidavit of the relator or counsel specifying the details of the claim." That affidavit must be " 'based on *personal knowledge.*' " (Emphasis *sic.*) *State ex rel. Sekermestrovich v. Akron* (2001), 90 Ohio St.3d 536, 538, 740 N.E.2d 252, 254, quoting *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 384, 700 N.E.2d 12, 17. Relator Shemo's verification of the complaint does not state that it is based on personal knowledge, and an affidavit of relator Shemo contained in relators' compendium of exhibits that is based on his personal knowledge does not cover all of the necessary details of relators' claim for extraordinary relief in mandamus. Dismissal of relators' case is thus required. See *Sekermestrovich,* 90 Ohio St.3d at 538-539, 740 N.E.2d at 254-255; *Logan v. Ohio Adult Parole Auth.* (1998), 84 Ohio St.3d 1423, 702 N.E.2d 433; *Goist v. Seventh Dist. Court* (1997), 79 Ohio St.3d 1452, 680 N.E.2d 1024.

Nevertheless, I agree that the dismissal should be without prejudice. Pursuant to Civ.R. 41(B)(3), as made applicable to this case by S.Ct.Prac.R. X(2), this court has the discretion to make an involuntary dismissal with or

without prejudice for failure to comply with rules like S.Ct.Prac.R. X(4)(B). See *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 1 OBR 125, 437 N.E.2d 1199. We need not automatically dismiss with prejudice all original actions that fail to comply with the affidavit requirement of S.Ct.Prac.R. X(4)(B).

In exercising our discretion here, it is evident that relators' noncompliance with S.Ct.Prac.R. X(4)(B) did not involve a *complete* failure to file an affidavit. Relators did attempt to verify their complaint and additionally filed an affidavit based on personal knowledge that supported *some* of the details of their mandamus claim. And relators' allegations, if ultimately established, specify respondents' violation of a 1997 common pleas court order that we unanimously reinstated last year. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 722 N.E.2d 1018.

Therefore, under these unique circumstances, relators should not be forever barred from raising their claim for extraordinary relief based on their partial noncompliance with S.Ct.Prac.R. X(4)(B). See *State ex rel. Montgomery v. R & D Chem. Co.* (1995), 72 Ohio St.3d 202, 204, 648 N.E.2d 821, 823, quoting *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193, 23 O.O.3d 210, 213, 431 N.E.2d 644, 647 ("'Fairness and justice are best served when a court disposes of a case on the merits'").

However, I would further caution relators, as well as other prospective relators, that future violations of S.Ct.Prac.R. X(4)(B) may be subject to dismissal with prejudice. See *Sekermestrovich, Logan,* and *Goist.* Flagrant, substantial disregard for court rules justifies a dismissal with prejudice. See *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48, 684 N.E.2d 319,

321, citing *DeHart,* 69 Ohio St.2d at 193, 23 O.O.3d at 213, 431 N.E.2d at 647. This case should provide prospective relators with sufficient warning regarding the potential consequences of not *fully complying* with the affidavit requirement of S.Ct.Prac.R. X(4)(B). Much like an umpire giving a pitcher a warning that the next pitch aimed at a batter's head may lead to his ejection, attorneys are similarly warned here.

Kahn, Kleinman, Yanowitz & Arnson CO., L.P.A., Sheldon Berns, Benjamin J. Ockner and *Robert A. Zimmerman*, for relators.

SHEMO ET AL., APPELLANTS. *v.*
MAYFIELD HEIGHTS ET AL., APPELLEES

[Cite as *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7.]

Municipal corporations – Zoning – Reinstatement of trial court's judgment declaring unconstitutional Mayfield Heights' U-2-A (cluster single-family) zoning classification of an undeveloped 22.6-acre parcel of land.

(No. 98-2054 – Submitted November 17, 1999 – Decided February 9, 2000.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 73241.

Plaintiffs-appellants Michael Shemo and Larry Goldberg are owners of an undeveloped 22.6-acre parcel of land in Mayfield Heights. The property is a generally triangular tract of land, with commercial properties bordering to the south, residential properties to the west on Bonnie Lane, and Interstate 271 to the east. Six Cleveland Electric Illuminating ("CEI") high-tension power lines traverse the eastern edge of the property. These power lines, along with high-intensity lighting from Interstate 271, run the entire eastern length of the property. In addition, CEI, pursuant to an easement, has the right to uninterrupted access to the property.

The property was initially zoned U-1 for single-family homes. In June 1995, appellants sought to invalidate the U-1 single-family zoning classification and filed a complaint for declaratory relief against defendants-appellees, the city of Mayfield Heights and individual city council members ("the city"). As part of this action, the parties entered into a stipulation that the U-1 zoning was unconstitutional and that Mayfield Heights had the right to rezone the property pursuant to *Union Oil Co. of California v.*

Worthington (1980), 62 Ohio St.2d 263, 16 O.O.3d 315, 405 N.E.2d 277. Over appellants' objection, on the same day that the city signed the stipulation, Mayfield Heights City Council enacted Ordinance 1995-42, which rezoned the property to a U-2-A (cluster single-family) classification.

Appellants then sought to invalidate the U-2-A zoning classification and to have the property rezoned to permit retail and warehouse use (U-4 classification). Following a visit to the property and a ten-day trial, the trial court determined, pursuant to the two-pronged test in *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, that the U-2-A residential zoning did not substantially advance a legitimate health, safety, or welfare concern of the city and denied the owner of the property an economically feasible use of the land. Thus, the trial court declared the U-2-A zoning classification unconstitutional.

The city appealed that decision. Pursuant to *Union Oil Co. v. Worthington, supra,* the court of appeals remanded the case to the trial court to determine whether appellants' proposed retail and warehouse use of the property was reasonable. The trial court found that the proposed use was reasonable, and the city filed another appeal.

During the pendency of the appeal, *Gerijo, Inc. v. Fairfield, supra,* which the trial court had relied upon, was modified by *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510. Because of this change in the law, the appellate court vacated the trial court's judgment and remanded the case for further determination in light of *Goldberg.*

The cause is now before this court upon the allowance of a discretionary appeal.

Kahn, Kleinman, Yanowitz & Arnson Co., L.P.A., Sheldon Berns and *Benjamin J. Ockner; Chester, Willcox & Saxbe, L.L.P.*, and *J. Craig Wright; Forbes, Forbes & Associates* and *George L. Forbes,* for appellants.

The Carr Law Firm, L. Bryan Carr and *Leonard F. Carr*, for appellees.

FRANCIS E. SWEENEY, SR., J. In this case, we are asked to decide whether Mayfield Heights' U-2-A zoning classification of the property is unconstitutional. Initially, we must decide whether the court of appeals was correct in remanding the case for reconsideration under the *Goldberg* decision. For the reasons that follow, we find that remand to the trial court was unnecessary. Since there was competent, credible evidence supporting the trial court's conclusion that the U-2-A zoning classification does not substantially advance a legitimate health, safety, and welfare concern of Mayfield Heights, we reverse the judgment of the court of appeals and reinstate the trial court's judgment declaring the zoning ordinance unconstitutional.

Prior to our decision in *Goldberg Cos., Inc. v. Richmond Hts. City Council, supra,* this court adhered to a two-part test when reviewing the legitimacy of zoning ordinances. Under that test, which was set forth in *Gerijo, Inc. v. Fairfield, supra,* we held that "[a] party who attacks a municipal zoning ordinance on constitutional grounds must prove, beyond fair debate, both that the enactment

deprives him or her of an economically viable use and that it fails to advance a legitimate governmental interest." *Id.* at syllabus. In *Goldberg,* we revisited this test and determined that the economic-viability prong is applicable only to those cases where the owner alleges a taking of the property. *Id.,* 81 Ohio St.3d at 210, 690 N.E.2d at 512. We found that "*Gerijo* established an unduly broad standard that encompassed both the standard for challenging the constitutionality of zoning regulations and the test to prove a taking." *Id.* at 213, 690 N.E.2d at 514. In modifying *Gerijo,* we discarded the two-prong test in favor of a single criterion. Thus, under *Goldberg,* where no taking is alleged, we need only decide whether the ordinance was "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Id.,* quoting *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303, 314.

The court of appeals determined that a remand was necessary because the trial court did not have the opportunity to apply the case law articulated in *Goldberg,* which was decided during the pendency of the appeal. Appellants contend that remand is unnecessary because they had already shown that the ordinance was unconstitutional under the more stringent test of *Gerijo.* Thus, appellants maintain that even without the evidence regarding economic viability, there was still sufficient evidence presented to support the trial court's decision that the zoning ordinance failed to substantially advance legitimate governmental interests. The city disagrees, believing that remand is necessary, since the trial court's decision wrongly considered both prongs of the *Gerijo* test, and because the economic-viability prong is inextricably intertwined with the health/safety/welfare prong.

We find no merit in the city's argument that the trial court incorrectly relied upon economic viability to come to the conclusion that the zoning ordinance was unconstitutional. A review of the trial court's decision reveals that the trial court discussed each prong of the *Gerijo* test separately, and independently found the ordinance unconstitutional under each prong of the test. Under these circumstances, where the trial court's opinion clearly sets forth the evidence relied upon to show that the zoning ordinance was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, the *Goldberg* standard has been met and there is no need for a remand to the trial court. Furthermore, we have previously held that a remand to consider new case law is unnecessary where the new case law has lessened the standard of proof for the prevailing party. See *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 699 N.E.2d 507. Since the trial court found that the zoning ordinance was unconstitutional under the more stringent *Gerijo* test, we find that it is unnecessary in this case to remand for reconsideration under the lesser *Goldberg* standard.[1]

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[1] Nor is remand to the court of appeals necessary to consider the assignments of error that were raised there by the city. Most of the alleged errors are implicitly resolved in determining the constitutionality of the zoning classification. Furthermore, we believe that the case can be appropriately decided by this court, since there is a comprehensive record before us and since the trial court made extensive findings of fact. See *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 18-19, 526 N.E.2d 1350, 1357. As for the remaining arguments, we reject the allegation that the city was prejudiced by the appearance of attorney George Forbes. We also decline to consider whether the court erred by

(Continued on following page)

We must next decide whether there was competent, credible evidence to support the trial court's judgment. In reviewing the trial court's judgment, it is well established that every reasonable presumption must be made in favor of the judgment and findings of fact. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273. Furthermore, judgments supported by competent, credible evidence going to the material elements of the case will not be disturbed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus.

In considering the evidence, we begin with the premise that all zoning ordinances are presumed constitutional. *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 583-584, 653 N.E.2d 639, 642. However, a zoning ordinance will be struck down if a property owner challenging the ordinance proves, beyond fair debate, that the ordinance is "arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg, supra,* 81 Ohio St.3d at 214, 690 N.E.2d at 515.

The city argued that the zoning ordinance advances three legitimate governmental health, safety, and welfare concerns: (1) it will maintain the residential character of the neighborhood, (2) it will maintain a balanced mix of uses in the city, and (3) it will not exacerbate traffic congestion and noise in the area. The trial court found

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refusing to consider expert testimony concerning economic viability, since that prong is irrelevant to the case at hand.

that appellants proved beyond fair debate that these concerns were not valid and that the ordinance was unconstitutional. We agree, and find that the trial record is replete with evidence to support the trial court's findings.

With respect to the argument that the U-2-A zoning was intended to advance the city's interest in maintaining the residential nature of the neighborhood, appellants presented ample evidence to show that this interest is not met by the U-2-A zoning. The property in question is located near the intersection of Interstate 271 and Mayfield Road. Although there are residential properties to the north and west on Ridgebury Boulevard and Bonnie Lane, the predominant uses to the south are commercial. The Golden Gate Shopping Center is located to the southwest of the intersection. A Best Buy store, a Budgetel Motel, and a Bob Evans restaurant are adjacent to the property. The Eastgate Shopping Center is east of Interstate 271 and north of Mayfield. In total, there are approximately three-quarter million square feet of retail space located in the vicinity of the property.

Nonetheless, the city argues that the area needs to be kept residential in nature. For support, the city presented the testimony of some current residents who are opposed to the commercial development of the property because there will likely be increased traffic in their neighborhood. While we do not mean to minimize the concerns of these residents and, in fact, sympathize with their plight, we cannot ignore the fact that their homes are adjacent to high-density commercial property, which carries with it a heavy volume of traffic. Traffic on the interstate alone exceeds ninety-two thousand vehicles passing by appellants' property daily. Therefore, although their streets are

obviously residential in nature, Robert Hill, city planner for several Cleveland suburbs, stressed that the existing development pattern around appellants' property indicates a nonresidential character. We reject the city's argument that the U-2-A zoning is necessary to maintain the residential character of the neighborhood.

We also reject the city's argument that the U-2-A zoning classification is necessary to advance the legitimate governmental interests of maintaining a balanced mix of uses in the city and decreasing traffic congestion in the area. Since the area contains both residential and commercial properties, there already exists a balanced mix of uses in the city. The goal of attaining a balance between both types of uses will be met regardless of whether the appellants' property is zoned for commercial or residential use. In addition, the city requires a six-foot masonry wall as a buffer between the retail and residential uses, which will help lessen the commercial feel of the area. Therefore, the trial court did not err in finding that a balanced mix of uses is not a legitimate governmental concern.

Nor did the trial court err in rejecting the city's argument that decreasing traffic congestion is a legitimate governmental concern. Although the U-4 zoning classification would increase traffic in the area, one of appellants' expert witnesses testified that the impact of the increased traffic would not be severe. Moreover, the current driveway configuration for the Best Buy, Budgetel, and Bob Evans properties is poorly designed and is described by a Mayfield Heights police officer as a safety hazard. However, appellants have proposed to widen and replace the current driveway at their expense and to have a traffic light installed to improve the flow of traffic in the area and to alleviate current safety concerns. Appellants have also

proposed to limit direct access from their property to the residential streets to cases of emergency only. While promoting traffic safety may be one factor courts can consider in determining whether a zoning ordinance is valid (see *Columbia Oldsmobile, Inc. v. Montgomery*, [1990], 56 Ohio St.3d 60, 66, 564 N.E.2d 455, 461), the city has not demonstrated that it is a legitimate concern in this case.

The trial court also found that the property is not suitable for residential use. According to the trial court, the property is degraded by the adjacent interstate, which carries with it extreme noise, pollution, and high-intensity lighting. Furthermore, the property has CEI high-tension poles and wires running the entire length of its eastern border. Given these characteristics, the court found that the property is not habitable.

The city contests these findings and the trial court's conclusion that the property is uninhabitable by downplaying the negative effects of the interstate and by pointing out that there are other residential properties adjacent to the interstate. Although there are other residential properties along the interstate, various witnesses testified that appellants' property is different from those properties and that its unique characteristics make it not suitable for habitation. For instance, expert witness real estate appraisers Roger Ritley and Wesley Baker both testified that this property is perhaps the only site along Interstate 271 surrounded by high-tension lines, two-family zoning, and retail uses. Even the city's expert witness, city planner David Hartt, concedes this point. Moreover, the high-intensity lights along this part of Interstate 271 are so bright that one witness testified that he was able to read a newspaper at 10:30 p.m., without

any other source of illumination. In addition to the six high-tension power poles, CEI's easement also encumbers the property. The irregular shape, small size, and grading of the property (which is even with the highway) also adversely affect the habitability of the parcel.

Although the city's expert planner, David Hartt, testified that the property is habitable, even he had to admit that given the surrounding characteristics of the property, the potential occupants of residential units would be limited to elderly and/or childless residents who are uninterested in using their yards on a regular basis. The trial court was free to reject testimony that the property is habitable in favor of the wide array of evidence that showed that the property is unsuitable for residential use.

The city also maintains that appellants themselves have caused the property to become a small, irregularly shaped remnant by selling off various portions of their property over the years. Furthermore, the city points out that it was appellants' decision to grant CEI the easement, which they now complain has a negative effect on the habitability of the property. Under these circumstances, the city argues, appellants should not be afforded relief from their self-created hardships.

We acknowledge the principle that property owners are not afforded relief from self-created hardships. *Reed v. Rootstown Twp. Bd. of Zoning Appeals* (1984), 9 Ohio St.3d 54, 55-56, 9 OBR 260, 261, 458 N.E.2d 840, 842. However, the situation presented here differs from those cases relied upon by appellee. For instance, in *Reed,* property owners deliberately created from a larger property a lot that was not in conformity with the applicable minimum lot size.

Therefore, they acted in direct contravention of a zoning resolution. In this case, appellants did not take action in violation of an established zoning resolution. Instead, over the years they made business decisions to sell off various portions of the original piece of property. While these decisions did cause their property to be difficult to develop as a residential property, other factors that adversely affect the property, such as the construction of the interstate and the installation of high-intensity lighting, were beyond their control. Under these circumstances, we decline to apply the principle that denies relief to owners who created their own hardship, and find that the trial court's conclusion that the property is uninhabitable is supported by competent, credible evidence.

Since appellants have shown that the city lacks any legitimate governmental health, safety, and welfare concerns in support of the U-2-A zoning classification, we find that the trial court was correct in declaring the U-2-A zoning ordinance unconstitutional.

We must next decide whether the trial court was correct in determining that appellants' proposed commercial use of the property was reasonable. We find that there was competent, credible evidence to support this conclusion. As previously shown, the property is unsuitable for residential use and is more appropriate for commercial use. The evidence presented shows that appellants' proposed commercial use of the property includes a plan to help alleviate current traffic concerns in the area of the Best Buy, Budgetel, and Bob Evans properties by changing the configuration of the existing driveway and installing a traffic light. In addition, the city requires a six-foot masonry wall and a forty-foot setback as buffers. We find that the trial court was warranted in holding that the proposed

U-4 commercial classification is not detrimental to the health, safety, and welfare concerns of the city and is a reasonable classification of the property.

We reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Judgment reversed.

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

THE STATE EX REL. SHEMO ET AL. v.
CITY OF MAYFIELD HEIGHTS ET AL.

[Cite as *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905.]

Motion for reconsideration granted in part and judgment modified in part.

(No. 2001-1325 – Submitted June 4, 2002 – Decided October 2, 2002.)

IN MANDAMUS.

ON MOTION FOR RECONSIDERATION.

Per Curiam.

{¶ 1} On April 10, 2002, we granted a writ of mandamus to realtors, co-owners as trustees of land located in the city of Mayfield Heights, Ohio, to compel respondents, the city and its mayor, city council, and planning commission, to commence appropriation proceedings to determine the amount of the city's temporary taking of realtors' property. *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59, 765 N.E.2d 345. We held that realtors established a compensable taking of their property because the city's application of U-1(1) and U-2-A single-family residential zoning classifications to their property was unconstitutional in that the application of these classifications did not substantially advance legitimate state interests. Id. at 64, 765 N.E.2d 345. We further held that realtors had established the period of the compensable taking as being from March 19, 1992, the date they claimed as the beginning date of the taking, i.e., when they first filed a declaratory judgment action challenging the application of U-1(1) zoning, until April 2001,

when the U-2-A zoning classification was invalidated. Id. at 69, 765 N.E.2d 345.

{¶ 2} On April 22, 2002, respondents filed a motion for reconsideration.

{¶ 3} On April 23, 2002, the United States Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), 535 U.S. ___, 122 S.Ct. 1465, 152 L.Ed.2d 517. In *Tahoe-Sierra*, the court held that moratoriums, totaling 32 months, on development in the Lake Tahoe Basin did not constitute a compensable taking although the moratoriums temporarily deprived affected landowners of all economically viable use of their property.

{¶ 4} On April 29, 2002, realtors filed a brief in opposition to respondents' motion for reconsideration.

Motion for Reconsideration

{¶ 5} We have used our reconsideration authority under S.Ct.Prac.R. XI to "'correct decisions which, upon reflection, are deemed to have been made in error.'" *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, 697 N.E.2d 181, quoting *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339. For the following reasons, we grant respondents' motion in part and shorten the period in which a compensable taking was found, but otherwise deny the motion.

Compensation for Application of
Invalid Zoning Ordinance

{¶ 6} Respondents raise three claims in support of reconsideration. In their first claim, they assert that *Shemo* sub silentio overruled established Ohio law, i.e., *Superior Uptown, Inc. v. Cleveland* (1974), 39 Ohio St.2d 36, 68 O.O.2d 21, 313 N.E.2d 820. In *Superior Uptown*, at the syllabus, we held, "A cause of action for money damages can not be maintained against a municipality for losses sustained as the result of the adoption of a rezoning ordinance which is subsequently declared invalid."

{¶ 7} Respondents' claim lacks merit. *Shemo* does not overrule *Superior Uptown*. *Superior Uptown* involved a direct action for money damages against a municipality and was based upon the doctrine of sovereign immunity. By contrast, this case involves a mandamus claim to compel public authorities to institute appropriation proceedings where an involuntary taking of private property was alleged and ultimately proven by realtors.

Takings Analysis

{¶ 6} Respondents raise three claims in support of reconsideration. In their first claim, they assert that *Shemo* sub silentio overruled established Ohio law, i.e., *Superior Uptown, Inc. v. Cleveland* (1974), 39 Ohio St.2d 36, 68 O.O.2d 21, 313 N.E.2d 820. In *Superior Uptown*, at the syllabus, we held, "A cause of action for money damages can not be maintained against a municipality for losses sustained as the result of the adoption of a rezoning ordinance which is subsequently declared invalid."

{¶ 7} Respondents' claim lack merit. *Shemo* does not overrule *Superior Uptown*. *Superior Uptown* involved a

direct action for money damages against a municipality and was based upon the doctrine of sovereign immunity. By contrast, this case involves a mandamus claim to compel public authorities to institute appropriation proceedings where an involuntary taking of private property was alleged and ultimately proven by realtors.

Takings Analysis

{¶ 8} Respondents next contend that reconsideration is warranted because we did not apply in our takings determination the analysis set forth in *Penn Cent. Transp. Co. v. New York* (1978), 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631. In *Penn Cent.*, the United States Supreme Court held that, in general, the determination of whether a land-use regulation constitutes a compensable taking is an ad hoc. factual inquiry that depends upon several factors, including the economic effect on the landowner, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the government action. Id. at 124, 98 S.Ct. 2646, 57 L.Ed.2d 631; see, also, *Palazzolo v. Rhode Island* (2001), 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592. For the following reasons, respondents' contention does not warrant reconsideration.

{¶ 9} First, respondents' attempted reargument of this contention is not authorized by our Rules of Practice. "A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration [and] shall not constitute a reargument of the case * * * ." S.Ct.Prac.R. XI(2)(A). Respondents previously asserted the applicability of the *Penn Cent.* inquiry in their merit brief.

{¶ 10} Second, it is not evident that the *Penn Cent./Palazzolo* analysis as applies to this case, in which the land-use regulations at issue were held to be unconstitutional as applied to the property, i.e., the U-1(1) and U-2-A zoning classifications did not substantially advance legitimate state interests. *Shemo*, 95 Ohio St.3d at 64, 765 N.E.2d 345. Neither *Penn Cent.* nor *Palazzolo* involved a claim that the applicable legislation did not substantially advance legitimate state interests. And in *Penn Cent.*, the United States Supreme Court emphasized that the landowners did not contest that New York City's objective in enacting the challenged landmark-preservation legislation was a permissible governmental goal or that the restrictions imposed on their land were appropriate means to secure that objective. Id., 438 U.S. at 129, 98 S.Ct. 2646, 57 L.Ed.2d 631.

{¶ 11} Third, even assuming that the *Penn Cent./Palazzolo* analysis applies, a finding of a compensable taking is still warranted. Restricting realtors' land to residential use on property that was held to be unsuitable for residential use had an obvious adverse economic impact on realtors, which necessarily interfered with their reasonable investment-backed expectations when they requested that the property be rezoned for retail development. Further, the city's application of residential classifications to their property did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights. *Shemo*, 95 Ohio St.3d at 64, 765 N.E.2d 345; cf. *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1989), 210 Cal.App.3d 1353, 1372, 258 Cal.Rptr. 893, where a California appellate court, on remand from the United States Supreme Court, held that there was no compensable regulatory

taking, while observing that "[t]he complaint does not allege * * * that it was unreasonable for the County to conclude these limitations would contribute substantially to the public safety." In addition, the duration of the challenged restrictions was much lengthier here than the challenged restrictions in *Tahoe-Sierra*, which totaled 32 months, Id. at ___, 122 S.Ct. at 1489, 152 L.Ed.2d at 553 ("the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claims").

{¶ 12} Therefore, respondents' reliance on *Penn Cent.* and *Palazzolo* in support of reconsideration is misplaced.

Tahoe-Sierra

{¶ 13} Respondents' reconsideration motion could not rely on *Tahoe-Sierra* because that case was decided one day after their motion. The court therefore sua sponte considers whether *Tahoe-Sierra* requires a modification of our decision in *Shemo*. Upon consideration, *Tahoe-Sierra* does not warrant vacation of our April 10 judgment.

{¶ 14} As realtors correctly note, unlike this case, *Tahoe-Sierra* did not involve the first prong of the regulatory takings test set forth in *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (application of land-use regulations to property constitutes a compensable taking "if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land"). In fact, in *Tahoe-Sierra*, the United States Supreme Court emphasized that the landowners challenging the temporary environmental moratoriums did not argue, as realtors did in this case,

that the moratoria did not substantially advance a legitimate state interest. Id. at ___, 122 S.Ct. at 1485, 152 L.Ed.2d at 548 ("recovery on * * * a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact").

{¶ 15} Moreover, to the extent that *Tahoe-Sierra* could be construed as an abandonment of most per se or categorical rules in regulatory takings cases, application of the *Penn Cent./Palazzolo* ad hoc factual inquiry here does not, as previously discussed, require a different holding.

{¶ 16} Therefore, *Tahoe-Sierra* does not demand a vacation of our judgment here.

Period of the Taking

{¶ 17} Respondents finally contend that we should reconsider the length of the period for the compensable taking.

{¶ 18} In this case, realtors requested that the period of the taking begin on March 19, 1992, when they first challenged the application of the U-1(1) single-family residential zoning classification to their property. We granted their request. *Shemo*, 95 Ohio St.3d at 69, 765 N.E.2d 345.

{¶ 19} The date of regulatory taking may begin on the date the challenged regulation was either enacted or applied to the subject property. See, generally, 8A Rohan & Resking, Nichols and Eminent Domain (3d Ed.2001) 24-36, Section 24.04[3], fn. 34; *First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1987), 482 U.S. 304, 319, 107 S.Ct. 2378, 96 L.Ed.2d 250.

{¶ 20} The date that the first of the challenged zoning classifications was adopted and applied to realtors' property preceded the date that realtors requested for the commencement of the taking, i.e., the date they first challenged the validity of the classification as applied to their property.

{¶ 21} But upon reflection, we deem this period to start in June 1995, when realtors refiled their action for declaratory judgment, and shorten the period of the temporary taking. In this regard, although realtors initially challenged the application of the U-1(1) classification to their property by a declaratory judgment action filed on March 19, 1992, they *voluntarily dismissed* this action in June 1995. Moreover, until they refiled their declaratory judgment action in that same month, they *never requested* that their property be rezoned to permit *retail* use, instead choosing to request that it be rezoned to permit multifamily *residential* development. Therefore, they were not harmed by the application of the challenged regulations to their property, which was ultimately found unsuitable for residential use, during the period from March 1992 to June 1995 when they did not seek to use their property for a nonresidential use. The appropriate starting date for the taking is consequently June 1995, when they specifically requested in their refiled declaratory judgment action that the property be rezoned to permit retail and warehouse development.

{¶ 22} Respondents assert that the period of the taking should be further shortened because any delay was due to the court's change in precedent, realtors' delay in preparing to build an access drive, the relatively late resolution of the issue concerning the paper streets that the city claimed it owned, and the R.C. 2744.04 statute of

limitations. Respondents' additional assertions lack merit for the following reasons.

{¶ 23} Neither *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, nor *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510, the two cases cited by respondents in their reconsideration motion, involved takings claims. Hence, respondents could not justifiably rely on them to support their unconstitutional application of residential zoning classifications to realtors' property. *Shemo*, 95 Ohio St.3d at 63-64, 765 N.E.2d 345.

{¶ 24} In addition, respondents' arguments concerning realtors' alleged delay in preparing to make access road improvements and the further delay concerning the resolution of the paper-streets issue were both raised in their initial brief; they cannot reargue them now. S.Ct.Prac.R. XI(2)(A). And as we held in *Shemo*, 95 Ohio St.3d at 68, 765 N.E.2d 345, "Any delays by realtors did not contribute to respondents' delay in finally rezoning the property to U-4 [retail and wholesale use]." Further, "realtors owned the property consisting of the 'paper streets' at the time the temporary taking occurred because the city had abandoned the property." Id.

{¶ 25} Finally, respondents waived their R.C. 2744.04 contention by failing to raise this affirmative defense in their pleadings. See *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 ("A statute of limitations is an affirmative defense that is waived unless pled in a timely manner").

Conclusion

{¶ 26} Based on the foregoing, we grant respondents' motion for reconsideration in part and shorten the period of the temporary taking from March 19, 1992 through April 2001 to June 1995 through April 2001. In all other respects, we deny respondents' motion for reconsideration.

Judgment accordingly.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY and LUNDBERG STRATTON, JJ., concur.

PFEIFER and COOK, JJ., concur in part and dissent in part.

Cook, J., concurring in part and dissenting in part.

{¶ 27} I would deny the motion for reconsideration in its entirety.

PFEIFER, J., concurs in the foregoing opinion.

Berns, Ockner & Greenberger, L.L.C., Sheldon Berns, Benjamin J. Ockner and Jordan Berns, for realtors.

Leonard F. Carr and L. Bryan Carr: Mansour, Gavin, Gerlack & Manos Co., L.P.A., Anthony J. Coyne, Bruce G. Rinker and Eli Manos, for respondents.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

Michael A. SHEMO, Co-Trustee, et al.
Plaintiffs-Appellees

v.

CITY OF MAYFIELD HEIGHTS, Ohio et al.
Defendants-Appellants

No. 73241.

Aug. 20, 1998.

Civil appeal from Common Pleas Court Case No. CV-291595. Judgment Vacated and Cause Remanded.

Timothy J. Grendell, Steven A. Targove, Grendell & Targove, Independence, George L. Forbes, Scott H. Schooler, Forbes, Forbes & Associates, Mark A. Ferguson, Taft, Stettinius & Hollister, Cleveland, for Plaintiffs-Appellees.

Leonard F. Carr, Leslie Y. Spencer, L. Bryan Carr, Carr, Feneli & Carbone, L.P.A., Mayfield Heights, for Defendants-Appellants.

JOURNAL ENTRY AND OPINION

ODONNELL, Presiding J.

This is the second time this matter has been appealed to our court.

Initially, in 1995, Michael A. Shemo and Larry Goldberg, co-trustees of a 22.6 acre parcel of land located in the City of Mayfield Heights abutting I-271 on the east, Bonnie Lane on the west, Ridgebury Boulevard on the north, and Maplewood Road to the south, filed a complaint in the

common pleas court contesting the constitutionality of the residential zoning of the property, and seeking to have the property re-zoned to permit retail and warehouse usage. The court conducted a bench trial, viewed the premises, and, after hearing all the evidence, determined in accordance with *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 638 N.E.2d 533, that the residential zoning failed to "substantially advance a legitimate health, safety or welfare concern," and denied an "economically feasible use" of the property to the owner; on that basis, the trial court declared the residential zoning to be "arbitrary, capricious, and unconstitutional." Upon appeal by the city of that decision to our court, we remanded the matter to the trial court for a further determination as to the reasonableness of the owner's proposed retail and warehouse use of the property, as mandated by *Union Oil Co. v. Worthington* (1980), 62 Ohio St.2d 263, 405 N.E.2d 277, and, following our remand, the court found that proposed use to be a reasonable one.

The City of Mayfield Heights now again appeals from these same Common Pleas Court determinations, seeking our review of them, and raises the following seven assignments of error concerning the constitutionality of the residential zoning and the reasonableness of the retail and warehouse usage:

I. THE TRIAL COURT ERRED BY FAILING TO FIND THAT PLAINTIFFS-APPELLEES LANDOWNERS WERE SINGULARLY RESPONSIBLE FOR THE SELF-INFLICTED HARDSHIP TO THE SUBJECT PROPERTY AND FOR ANY DEGRADATION TO THE VALUE OF THE SUBJECT PROPERTY THUS PRECLUDING THE GRANT OF THE REQUESTED ZONING, ALL OF

WHICH IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO ADVANCEMENT OF A LEGITIMATE GOVERNMENTAL INTEREST IN THE HEALTH, SAFETY AND WELFARE OF THE COMMUNITY BY MAINTAINING THE CURRENT ZONING OF THE SUBJECT PROPERTY, ALL OF WHICH IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT'S FINDING THAT THE LAND IS UNINHABITABLE AS CURRENTLY ZONED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. THE TRIAL COURT ERRED BY FINDING THAT THE SUBJECT PROPERTY AS CURRENTLY ZONED DENIES PLAINTIFFS-APPELLEES AN ECONOMICALLY "FEASIBLE" (VIABLE) USE OF THE LAND.

V. DEFENDANTS-APPELLANTS WERE UNFAIRLY PREJUDICED BY THE LAST MINUTE APPEARANCE OF ATTORNEY GEORGE FORBES.

VI. THE TRIAL COURT ERRED BY REFUSING TO CONSIDER THE TESTIMONY OF THE DEFENDANTS-APPELLANTS' EXPERTS RELATIVE TO THE ECONOMIC VIABILITY OF THE DEVELOPMENT OF THE SUBJECT PROPERTY AS CURRENTLY ZONED.

VII. THE TRIAL COURT'S FINDING THAT PLAINTIFFS-APPELLEES' PROPOSED RETAIL PLAN WAS REASONABLE WAS ERROR AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

On this appeal, the city contends the trial court erred when it declared the residential zoning unconstitutional and found the retail and warehouse usage to be reasonable. We recognize that appellees urge the court properly determined these matters.

Here, the record demonstrates that the trial court judge followed the law then in effect as articulated in *Gerijo, Inc. v. Fairfield, supra,* and *Union Oil Co. v. Worthington, supra.* However, subsequent to the trial court's determinations, and prior to our consideration of the matters raised on this appeal, the Ohio Supreme Court in *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207, 690 N.E.2d 510 modified the *Gerijo, Inc. v. Fairfield, supra* standard in part, re-established the standard articulated in *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 as applicable to constitutional challenges involving zoning regulations, and stated in its syllabus:

A zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community.

In its opinion at 214, the court further stated: "The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains "beyond fair debate." See [*Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581] at 584, 653 N.E.2d at 642."

The timing of the modification by the Ohio Supreme Court in the applicable law precludes our consideration of the assignments of error advanced by the city in this case. The reason this is so is best stated in the *per curiam* opinion in

The Peerless Electric Co. v. Bowers (1955), 164 Ohio St. 209, at 210, 129 N.E.2d 467:

* * * The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. * * * .

We, of course, recognize that the supreme court did not specifically overrule *Gerijo, Inc. v. Fairfield, supra,* but merely modified its application in accordance with *Euclid v. Ambler Realty Co., supra.* Nonetheless, a decision of the Ohio Supreme Court shall be applied retroactively unless a specific provision declares its application to be prospective only. See *N. Olmsted v. Eliza Jennings, Inc.* (1993), 91 Ohio App.3d 173, 631 N.E.2d 1130. See, also, *O'Connor v. Zimmer* (1995), 104 Ohio App.3d 143, 661 N.E.2d 248.

Accordingly, as the trial court never had an opportunity to apply the law as articulated in *Goldberg Cos., Inc. v. Richmond Hts. City Council, supra,* to this case, we now vacate the judgment of the trial court and remand the matter for a determination by that court in conformity with that prevailing standard of review.

Judgment vacated and cause remanded.

Judgment vacated and cause is remanded to the lower court for further proceedings consistent with this opinion.

Costs to be divided equally between appellees and appellants.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

TIMOTHY E. McMONAGLE and JAMES D. SWEENEY, JJ., concur.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

MICHAEL A. SHEMO, CO-TRUSTEE, ET AL. Appellee -vs- CITY OF MAYFIELD HEIGHTS, OHIO, ET AL. Appellant	COURT OF APPEALS NO. 70715 LOWER COURT NO. CV-291595 COMMON PLEAS COURT MOTION NO. 82009

DATE APRIL 3, 1997

Journal Entry

Motion by appellee, Michael A. Shemo, to dismiss appeal is granted.

Upon a review of the record, the trial court in its December 26, 1995 order, declared the U-1 zoning of the tract of undeveloped land between Ridgebury Boulevard, Mayfield Road, at Interstate 271, unconstitutional, and thereafter permitted the City of Mayfield Heights to reclassify the property and the court retained jurisdiction at that time to review the same.

In its May 16, 1996 journal entry, the court declared the U-2 reclassification of the property unconstitutional and provided the city a second opportunity to rezone or reclassify the property.

Pursuant to *Union Oil Co. v. Worthington* (1980), 62 Ohio St. 2d 263, the court, at that time, should have

determined the reasonableness of the owner's proposed use of the land.

Accordingly, the case is remanded to the trial court for further proceedings consistent with this announcement. Costs to appellant.

O'DONNELL, J., CONCURS
PRYATEL, J., CONCURS AND DISSENTS
(Judge August Pryatel, Retired, Eighth Appellate District, Sitting by Assignment)
(See attached opinion.)

/s/- James D. Sweeney
CHIEF JUSTICE
JAMES D. SWEENEY

This is an announcement of Court's decision. Motion for reconsideration must be filed within 10 days from date hereon.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 70715

MICHAEL A. SHEMO, Trustee, et al Plaintiffs-appellees vs. CITY OF MAYFIELD HEIGHTS Defendant-appellant	CONCURRING AND DISSENTING OPINION
DATE OF ANNOUNCEMENT OF DECISION	APRIL 3, 1997

AUGUST PRYATEL, J., CONCURRING IN PART AND DISSENTING IN PART:

Cross-appellants (also known as plaintiffs-appellees) have raised the issue of applicability of *Union Oil Co. of California v. City of Worthington* (1980), 62 Ohio St. 2d 263, which the lower court failed to address. Accordingly, I join with the majority in dismissing the appeal.

However, in my judgment, the lower court is precluded from determining the "reasonableness of the owners' proposed use of the land" in view of appellant's timely appeal of the trial court's ruling of unconstitutionality of the U-2(A) zoning.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL A. SHEMO, CO-TRUSTEE, et al. Plaintiffs, -v- CITY OF MAYFIELD HEIGHTS, OHIO, et al. Defendants.	CASE NO. CV-291595 JUDGE SHIRLEY STRICKLAND SAFFOLD **FINAL JUDGMENT ENTRY** (Filed Sep. 2, 1997)

This matter came before the Court for trial on March 6-8. 11-14 and April 12, 15-16, 1996 after which the Court issued its Journal Entry dated May 16, 1996 declaring the Defendant City of Mayfield Heights' U-2A zoning classification as applied to Plaintiffs' Property (as described in the Complaint) to be unconstitutional. The Court's May 16, 1996 Journal Entry is incorporated by reference herein.

Remaining for adjudication is the reasonableness of the Plaintiffs' proposed retail use of their Property. After consideration of the ten (10) days of testimony, the admitted documentary evidence and the Court's site visit, the Court finds that the Plaintiffs' proposed retail use of the Property, as generally described in Plaintiffs' Site Plan (Plaintiffs' Exhibit 16), is reasonable. The Plaintiffs are hereby permitted to use and develop their Property generally consistent with the prepared Site Plan proposed by Keera Kekst (Plaintiffs' Exhibit 16) introduced into evidence at trial and consistent with the terms of the recorded deed restrictions (Plaintiffs' Exhibits 80, 81) and recorded access easement (Plaintiffs' Exhibit 82). The Court further orders the Plaintiffs to make the improvements to

Golden Gate Boulevard as described in their Site Plan and the record of the trial proceedings and orders the City to take any and all actions to facilitate such road improvements and to not interfere with such road improvements. The City of Mayfield Heights and the individually named Defendants are hereby enjoined from interfering with Plaintiffs' proposed retail use of the Property and the installation of the above stated road improvements, and are ordered to issue all approvals and permits to allow such retail development and use consistent with this Order.

/s/ S. Strickland Saffold 9/2/97
JUDGE, Cuyahoga County
Common Pleas Court

cc: George L. Forbes, Esq.
Timothy J. Grendell, Esq.
Leonard F. Carr, Esq.

THE STATE OF OHIO	)	IN THE COURT OF
	) SS.	COMMON PLEAS
CUYAHOGA COUNTY	)	CASE NO. 291595

MICHAEL A. SHEMO, CO-TRUSTEE, et al.,

Plaintiffs,

-vs-

CITY OF MAYFIELD HEIGHTS, OHIO, et al.,

Defendants.

OPINION AND JUDGMENT ENTRY
5/16/96

S. Strickland Saffold, J.:

The Plaintiffs, Michael A. Shemo and Larry Goldberg, are owners[1] of an undeveloped 22.6 acre parcel of land in Mayfield Heights. This 22.6 acre parcel (hereinafter the "Property") is an irregularly shaped tract of land bordering commercial properties to the south on Mayfield Road, residential properties to the north and west on Ridgebury Boulevard, and Bonnie Lane, and Interstate-271 to the east. On the eastern most edge of the Property are located six Cleveland Electric Illuminating Company (CEI) electric transmission towers carrying 138 kvh high tension power lines. These power lines, and the interstate with its high intensity lighting, run the entire length of the Property (approximately 2,000 feet). CEI, pursuant to an easement, has the right to uninterrupted access, ingress

[1] In fact, the Plaintiffs hold the subject property as Co-Trustees for Milton Wolf and various branches of the Goldberg families.

and egress to the property to relocate, construct, reconstruct, operate, repair, maintain, renew and remove electric transmission lines, including poles and other structures. Finally, the easement area is 75 feet wide, and it forbids any construction of buildings, any changes in grade, any excavation or addition of fill within the easement without prior written approval of CEI. Until late 1995, the Property was zoned U-1 for single family homes only.

On March 19, 1992, Plaintiffs filed a Complaint for Declaratory Judgment in the Cuyahoga County Court of Common Pleas seeking to invalidate the U-1 single family zoning classification. On June 8, 1995, *Michael A. Shemo, et al. v. City of Mayfield Heights, et al.*, Case No. 299140, was voluntarily dismissed without prejudice. Upon subsequently refiling, the instant action, the parties entered a stipulation by which the defendant. City of Mayfield Heights, agreed that the U-1 single family zoning classification was constitutionally invalid. Further, the parties agreed pursuant to *Union Oil v. City of Worthington* (1980), 62 Ohio St.2d 263 that: 1) the City had the right to rezone the Property to a constitutionally valid use: and 2) the Plaintiffs reserved the right to challenge the subsequent zoning classification. This stipulation was made an order of the Court on December 22, 1995. Further, this Court entered an order, in accordance with an agreement between of [sic] the parties, invalidating the U-1 zoning classification.

On December 11, 1995, Mayfield Heights City Council met for the purpose of rezoning the Property. Council, over the objections of the Plaintiffs, enacted Ordinance 1995-42 which rezoned the Property to a U-2A (cluster single family) classification. A U-2A Planned Unit Development

District requires a minimum 40 acre project area and a maximum overall density of 3.5 units per acre. See Mayfield Heights Zoning Code §1162.04. As the subject Property is only 22.6 acres, Council, on its own initiative, granted a variance from the 40 acre minimum project size and the 3.5 unit per acre density requirements of the U-2A district.

The Plaintiffs contend that upon stipulating that the U-1 classification was unconstitutional, the Defendants failed to rezone the Property within a reasonable time and in a constitutionally permissible manner pursuant to *Union Oil Co. of California v. City of Worthington* (1980), 62 Ohio St.2d 263. As such, Plaintiffs argue that the Court need not determine whether the U-2A zoning classification substantially advances a legitimate health, safety or welfare interest of Mayfield Heights, or provides the Property owners with an economically feasible use of their land. Rather, they contend that the Court may move directly to the issue of the reasonableness of Plaintiffs' development plan.

The Court finds that the City of Mayfield Heights did in fact rezone the Property within a reasonable time when it enacted Ordinance 1995-42. As such, this Court will determine the constitutionality of the U-2A zoning classification.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, (quoting *Agins v. Tiburon*, 447 U.S. 225), the U.S. Supreme Court held that the Takings Clause of the United States Constitution is violated when a zoning ordinance "does not substantially advance legitimate state interest or denies an owner economically viable use of his land." (emphasis added).

However, in *Central Motors Corp. v. Pepper Pike, et al.*, (1995) 73 Ohio St.3d 581, the Ohio Supreme Court held that a plaintiff is required to satisfy both prongs of the *Lucas* test. In order to be successful in having a zoning regulation declared unconstitutional, therefore, a plaintiff must satisfy both parts of the above test, "beyond fair debate." *Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12, 19. Fair debate was defined in *Central Motors v. City of Pepper Pike, et al.* (1979), 63 Ohio App.3d 34, when Judge Krenzier wrote:

> The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.
>
> * * *
>
> Therefore, the courts must in an objective manner scrupulously review the underlying relevant and material evidence and facts in the case as well as the evidence upon which expert opinions are based before making a determination of the validity or invalidity of a zoning ordinance. Courts should resist the tendency to make a determination in regard to the validity of a zoning ordinance based on the mere conclusion or opinion of experts. If two experts have differing opinions, the court should not automatically rule that the issue of the validity of a zoning ordinance is

> fairly debatable without ever reviewing the underlying evidence. For a mere difference of opinion or a conflict in testimony does not require a finding that the reasonableness of a zoning ordinance is fairly debatable.

Id. at p. 51.

Therefore, in Ohio, for the Plaintiffs to succeed, they must satisfy both prongs of the *Lucas* test. In other words, they must prove beyond fair debate that the U-2A classification, as applied to the Property: 1) does not substantially advance a legitimate health, safety, and welfare concern of Mayfield Heights: and 2) that the U-2A zoning classification renders the Property economically nonviable.

The City of Mayfield Heights has alleged that the U-2A zoning classification is related to the following three legitimate health, safety and welfare concerns: 1) maintaining the character of the neighborhood: 2) maintaining a balanced mix of uses in Mayfield Heights; and 3) not exacerbating traffic congestion in the city.

First, in *Leslie v. Toledo* (1981), 66 Ohio St.2d 488, the Court held that maintaining the residential nature of a neighborhood can be a legitimate governmental concern. However, the Court must determine whether the local governing entity is attempting to arbitrarily banish commercial development or is instead earnestly striving towards its stated goals. *See Henry Meyer Assoc., Inc. v. Village of Moreland Hills*, 1994 WL 693509 (Ohio App. 8th Dist. 1994).

In this case, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to the Property does not substantially advance Mayfield Heights' interest in maintaining the

character of the residential neighborhood. The Property is located within the I-271 and Mayfield Road intersection. At one point, all of Mayfield Heights was zoned single family. Since 1979, however, the City has rezoned for commercial uses a substantial portion of the land immediately adjacent to the Property. Today, the predominant uses within this intersection are retail/commercial and high density residential. To the southwest of the intersection lies the Golden Gate Shopping Center and a Cantina Del Rio Restaurant. To the southeast is the large Marsol apartment complex. To the northeast lies the Plymouth Park Apartments and an Eastside Mario's restaurant. Finally, in the northwest quadrant of I-271 and Mayfield Road lies a regional Best Buys store, a Bob Evans Restaurant, and a Budgetel Motel, which are immediately adjacent to the subject Property. As such, the extensive rezoning of the land immediate [sic] adjacent to the subject Property proves beyond fair debate that the City has not advanced a substantial interest in maintaining the residential character of the neighborhood.

Second, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to the Property does not substantially advance Mayfield Heights' interest in maintaining a balance of uses. In fact, permitting commercial zoning next to the two-family residential uses on Bonnie Lane helps maintain a mix of uses. Further, the Mayfield Heights Zoning Code, by providing for masonry walls and setbacks between the two uses, greatly eases the transition between the commercial and residential uses, making the mix more appropriate.

Third, the Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as

applied to the Property does not substantially advance Mayfield Heights' interest in not exacerpating traffic congestion. While traffic may be considered as one factor in the overall evaluation of zoning validity, the law requires that traffic and road conditions be kept in proper prospective as a part of the total problem on zoning. *See Columbia Oldsmobile, Inc. v. Montgomery* (1990), 56 Ohio St.3d 60. A municipality may not use its zoning code for the purpose of avoiding its responsibility to provide adequate roads and municipal services. *Alseanas v. Brecksville*, 29 Ohio App.2d 255, 263 (Cuy. Cty. 1972). Prior to this case, the City has never taken an interest in controlling traffic through the streets north of Maplewood, except for precluding truck traffic through streets in this area. On numerous occasions the City has rezoned properties to the immediate south to U-4 retail/commercial without undertaking any traffic impact studies. Further, in doing this, the City has specifically found that the zoning changes to U-4 were within the health, safety and welfare interests of the people of Mayfield Heights. Finally, there is no health, safety and welfare reason for keeping the traffic situation as it is presently. Mayfield Heights Police Officer Robert Bandelow testified that the adjacent Best Buy/Budgetel/Bob Evans drive is a safety hazard as currently designed. The merging traffic and poor lane identification are extremely dangerous and result in frequent accidents.

In addition, the Court finds that there is no legitimate health, safety or welfare concern which is substantially advanced by maintaining a residential zoning classification on the Property, as the Property is not suitable for habitation. The Property is extremely degraded by the adjacent freeway and high tension electric lines. Presently,

92,000 vehicles per day pass alongside the Property. By the year 2015, it is estimated that over 106,000 per day will travel the adjacent freeway. This vehicular traffic cause [sic] three major problems – noise, light and pollution. The eastern boarder of the Property is lined with high intensity freeway lights. This light is so intense that Plaintiff's expert, Roger Ritley, testified that the freeway lights enable an individual to read a newspaper in the dead of night while standing on the Property. Finally, there are CEI high tension poles and wires running the length of the eastern boarder of the Property. Therefore, based on the foregoing, the Court finds that the Plaintiffs have satisfied the first prong of the *Lucas* test. That is, the Plaintiffs have, beyond fair debate, demonstrated that U-2A zoning does not substantially advance a legitimate health, safety or welfare interest of the City of Mayfield Heights.

The second prong of the *Lucas* test requires that the Plaintiffs demonstrate that the zoning classification denies the owner of an economically feasible use of the land. A property is rendered economically nonviable when a zoning ordinance "denies an owner all uses except those which are highly unlikely or practically impossible under the circumstances." *Gerijo v. Fairfield* (1994), 70 Ohio St.3d 223. In other words, "zoning regulations that effectively make a land owner's property valueless without any corresponding public benefit can constitute unconstitutional takings." *Clark v. Woodmeyer* (1985), 28 Ohio App.3d 66, 68.

The Court finds that the Plaintiffs have proven beyond fair debate that the U-2A zoning classification as applied to their Property renders it economically nonviable because:

(a) It is undisputed that the freeway and high tension towers and wires, negatively impacts any cluster residential development on the Property.

(b) David Boston, an MA appraiser and recognized expert on the effect of high tension electric power lines on real estate marketability, testified that power lines, like those which run the entire 2,000 feet length of the Property, reduce a property's value by 13-30%. This devaluation is the result of a popular perception of adverse health effects from the electromagnetic field created by power lines. Given the size of the Property and the relatively small number of homes which can be placed on it, a 13-30% devaluation significantly decreases the likelihood that a cluster home project on the Property could be economically feasible.

(c) Defendants' expert planner, David Hartt, testified that Plaintiffs could develop a maximum of 83 homes on the subject property. Plaintiffs' expert planner, Robert Hill, testified that a maximum of 66 homes could be constructed on the Property in accordance with the U-2A zoning classification, as "amended" by the December, 1995 variances. This divergence in opinion between Mr. Hill and Mr. Hartt does not create "fair debate" sufficient to find for Mayfield Heights on the issue of economic nonviability. Whether 66 or 83 homes were placed on the Property, the cluster home development would be doomed and economically nonviable because of the numerous adverse physical realities negatively influencing the Property.

(d) Plaintiffs' economic expert, Roger Ritley, testified that the cost to develop 66 or 83 homes would exceed any economic return for the Plaintiffs. Mr. Ritley reached this conclusion by conducting a cost analysis. Mr. Ritley's testimony on this issue is unrebutted in the record. Defendants did not engage an expert to conduct a cost analysis to rebut Mr. Ritley's testimony.

(e) Mr. Ritley's testimony was underscored by the practical experience of Paris Development Company with the L'Avion project in Pepper Pike. Paris' President George Zamecnik testified that after eight years *none* of the lots abutting I-271 and the high tension wires had been sold. This did not mean economic ruin for Paris at L'Avion because of the much larger total development and the depth of L'Avion away from the freeway. However, such a result would be devastating to Plaintiffs' project on the Property because *all* of the homes would be freeway and high tension lines and tower impacted lots. In addition, Mr. Zamecnik testified that the freeway lots at Highland Woods were reduced in price by 25%. The interior lots subsidized the freeway lots. Mr. Shemo also testified that the vacancy rates at the Plymouth Park Apartments, directly across I-271 from the subject property, was five times greater for freeway facing apartments than those on the interior. This testimony is compelling since all of the proposed lots on the Property are freeway and high tension lines and tower impacted lots.

(f) Mr. Baker's testimony that the Property had some value developed as a cluster home site

under the UI-2A classification was not credible and thus does not create an issue of fair debate. First, the comparable sites which Mr. Baker used in his appreciable did not have all or even a majority of the degrading factors as the Property. Second, compared to a cost analysis, an appraisal does not give this Court a true picture of the viability of cluster home development on the site since it does not consider the cost of such development or its economic feasibility. Third, Mr. Baker admitted that he has not conducted a market or economic cost feasibility analysis for the Property as zoned U-2A. Fourth, Mr. Baker testified that between the date of his first report in 1994 and his second in 1996 that the Property's value had increased by 25%. This testimony is not credible given the fact that the only changes in the Property were the increased degrading facto of the completion of the high speed lanes on I-271 and addition of the high intensity freeway lights.

(g) Testimony by two Mayfield Heights residents, Lisa Land and Nadine Bowen, that they would live on the Property despite the freeway, high tension wires and adjacent commercial use is not probative on the issue of economic nonviability. As the Cuyahoga County Court of Appeals held in *Brooklyn Airport Associates v. City of Brooklyn*, 1994 WL 693543 (1994) "Legal matters are decided by facts, not beliefs or desires." *See also Pinnacle Woods Survival Game, Inc. v. Hambden Township Zoning Inspector*, 33 Ohio App. 3d 139, 514 N.E. 2d 906 (Geauga 1986), in which the Geauga County Court of

> Appeals held, in its second syllabus: The objections of a large number of residents of an affected neighborhood are not a sound basis for the denial of a zoning certificate. *See also, SCA Services of Ohio, Inc. v. Ream*, 1985 WP 6480 (1985). "In summary, we point out that this is a government of laws and not of men." Land use is regulated by law and not by popular outcry. Moreover, their testimony that their concerns about the effect of the retail development on their neighborhood, but that they would live under the high tension lines on the Property calls into question their credibility.

Therefore, the Court finds that the Plaintiffs have satisfied, beyond fair debate, both prongs of the *Lucas* test. That is, Plaintiffs have shown: 1) that the U-2A zoning classification does not substantially advance a legitimate health, safety or welfare concern of the City of Mayfield Heights: and 2) that the U-2A zoning classification denies the owner of an economically feasible use of the land. Accordingly, the Court finds in favor of the Plaintiffs and holds that the U-2A zoning classification is arbitrary, capricious, and unconstitutional.

Finally, in *Union Oil Co. of California v. City of Worthington* (1980), 62 Ohio St.2d 263, the Court held that upon finding an existing zoning classification unconstitutional, the trial court may not order the property rezoned to a new and different use classification. *Id.* at p. 263. Rather, the trial court must put the zoning authority on notice that it may rezone the property within a reasonable time certain. Therefore, the Court hereby puts the City of Mayfield Heights on notice that it may rezone the Property within 90 days of this order. As such, the Court will

not at this time address the reasonableness of Plaintiffs' proposed use of the Property.

IT IS SO ORDERED.

/s/ S. Strickland Saffold
S. Strickland Saffold, Judge

DATE: May 16th, 1996.

Supreme Court, U.S.
FILED
FEB 3 2003
OFFICE OF THE CLERK

No. 02-914

(2)

In The
Supreme Court of the United States

CITY OF MAYFIELD HEIGHTS, MAYOR MARGARET A. EGENSPERGER, et al.,

Petitioners,

v.

MICHAEL A. SHEMO, Trustee, and LARRY GOLDBERG, Trustee,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SHELDON BERNS, ESQ.
Counsel of Record
BENJAMIN J. OCKNER, ESQ.
JORDAN BERNS, ESQ.
BERNS, OCKNER & GREENBERGER, LLC
24500 Chagrin Blvd., Suite 101
Beachwood, Ohio 44122
Telephone: 216-831-8838
Facsimile: 216-464-4489

STEVEN S. ROSENTHAL, ESQ.
ALAN PALMER, ESQ.
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005-2327
Telephone: 202-682-3500
Facsimile: 202-682-3580
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Michael A. Shemo, Trustee, and Larry Goldberg, Trustee (collectively, "Trustees") respectfully urge this Court to deny the Petition for a Writ of Certiorari ("Petition" or "Pet.") of Petitioners City of Mayfield Heights, Ohio, *et al.* (collectively, "City") seeking review of the Ohio Supreme Court's decision in *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 765 N.E.2d 345, *reconsideration granted in part*, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002).

COUNTER-STATEMENT OF THE CASE

The City describes this dispute as a challenge to an "errant" or "obsolete" zoning regulation in effect for more than 70 years, and describes the City's conduct as "inaction" resulting in "normal delays in obtaining building permits, changes in zoning ordinance, variances, and the like." Pet. at 10, 16, 18. Nothing could be further from the truth. The zoning classification that was held unconstitutional as applied to the Trustees' property was one to which the City, over the Trustees' objection, rezoned that property on December 11, 1995. For three years beginning in March 1992, the City defended the constitutionality of the "70 year old" U-1(1) detached single-family ordinance before stipulating its invalidity on December 11, 1995. On that same day, the City rezoned the property to U-2-A, allowing only detached and attached single-family use. The City defended the constitutionality of the application of that classification to the Trustee's property until April 21, 2000, when the Ohio Supreme Court denied the City's request to reconsider its unanimous February 9, 2000 decision affirming the Cuyahoga County Common Pleas Court's holding that, as applied to the property, the ordinance was arbitrary, capricious and unreasonable, and failed to substantially advance any legitimate governmental interests of the City. Thereafter, the City not only refused to comply with the trial court's order (thus requiring the

Trustees to seek a writ of mandamus from the Ohio Supreme Court compelling the City to comply with that order), but actively engaged in conduct to stop the development of the Trustees' property in accordance with that order, prompting two members of the Ohio Supreme Court *sua sponte* to suggest that the court also award attorneys fees against the City. Such conduct was not inaction nor was the almost ten year period during which the City trampled the constitutional rights of the Trustees a "normal delay in obtaining a building permit."

The subject property (the "Property")[1] is an irregular triangular shaped 22.6 acre parcel of land owned by the Trustees located near the intersection of Interstate 271 and Mayfield Road in the City of Mayfield Heights. To the south, the Property is bordered by several retail and commercial properties including a big box appliance store, a motel, and a restaurant. To the northeast, it is bordered by Interstate 271, a ten-lane interstate highway with daily traffic exceeding 92,000 vehicles. The Property is at grade with the highway, and is degraded by the noise and pollution from the traffic it carries. In addition, high-intensity lighting on the highway floods the Property with so much light that it is possible to read a newspaper at 10:30 p.m. while standing in the middle of the Property without any other light source.[2] Additionally, six massive electric transmission towers carrying high tension power lines are located on the northeastern edge of the Property. The transmission towers, power lines and high intensity lighting from the adjacent highway run the entire 2,000 foot length of the Property's northeastern border. On March 19, 1992, the Trustees filed suit against the City in

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[1] The facts regarding the Property are described in *Shemo v. Mayfield Heights*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) ("*Shemo I*"), Petition Appendix – "App." – 34-45, at App. 40-43.

[2] Trial testimony of Roger D. Ritley in *Shemo I*, Transcript at 1004-1005.

the trial court seeking a declaratory judgment that the U-1(1) detached single-family use classification was unconstitutional as applied to the Property. The Trustees initially sought to develop the Property for multi-family residential use. App. 1. They dismissed that suit on June 28, 1995 after determining that the Property was not suitable for habitation.[3] The Trustees then refiled suit seeking a declaratory judgment that the U-1(1) detached single-family use classification was unconstitutional as applied to the Property, and a determination that a specific retail use the Trustees proposed for the Property was reasonable. App. 1.[4]

On December 11, 1995, having defended its constitutionality as applied to the Property for more than three years, the City then stipulated that the U-1(1) detached single-family use classification was invalid as applied to the Property and agreed to rezone the Property to a constitutional use classification. Incredibly, on that same day, the City rezoned the Property, over the Trustees' objections, to *another* form of single-family use classification, U-2-A, allowing only detached and attached single-family homes. App. 2.

The Trustees challenged the constitutionality of the new single-family use classification as applied to the Property. A trial was conducted over a ten day period in March and April 1996, during which the trial court heard evidence as to the constitutionality of the U-2-A use classification as applied to the Property, and the reasonableness of the Trustees' proposed retail use as shown in the Site Plan. The City defended the constitutionality of the U-2-A zoning classification as applied to the Property by

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[3] Trial testimony of Michael A. Shemo in *Shemo I*, Transcript at 176-178.

[4] The retail use was the subject of a site plan dated April 22, 1995 (the "Site Plan").

introducing testimony of a planner the City engaged to defend the single-family zoning ordinance in court. The planner, conceding that he knew of no other land that was burdened by the same degrading characteristics of the Property, App. 42, testified that the Property was suitable for childless, old couples who had no desire to be outdoors, and who would keep their windows shut to block the noise and light from the adjoining interstate highway. App. 43.[5]

By an Opinion and Judgment Entry dated May 16, 1996, App. 67-79, the trial court found, *inter alia*, that the Property was not "suitable for habitation", App. 73, and held that the U-2-A classification was unconstitutional as applied to the Property. App. 78. Consistent with the test articulated in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E.2d 533 (1994), the trial court held that the Trustees had established beyond fair debate that those regulations failed to substantially advance the City's legitimate health, safety or welfare concerns and denied the Trustees of the economic feasible use of the Property. App. 78.[6] The trial court properly rejected the incredulous testimony of the City's planner.

The trial court made no determination as to the reasonableness of the Trustees' proposed retail use; instead, pursuant to *Union Oil v. City of Worthington*, 62 Ohio St. 2d 263, 405 N.E.2d 277 (1980),[7] the trial court

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[5] The testimony of the City's planner is included in the Supplement filed by the Trustees with the Ohio Supreme Court in *Shemo I*.

[6] *Gerijo* held that a zoning ordinance was not unconstitutional as applied to property unless the owner demonstrated beyond fair debate that the ordinance failed to substantially advance legitimate state interests *and* deprived the owner of the economic viable use of the property.

[7] *Union Oil* established the procedure under Ohio law to be followed by trial courts in reviewing the constitutionality of specific zoning classifications when applied to property.

advised the City "that it may rezone the Property within 90 days" of the order. App. 78.

The City then filed a notice of appeal to the Cuyahoga County Court of Appeals. By a Journal Entry dated April 3, 1997, App. 62-64, the Court of Appeals remanded the case to the trial court to rule on the reasonableness of the Trustees' proposed retail use pursuant to *Union Oil*. On September 2, 1997, the trial court entered its Final Judgment Entry (the "Trial Court's Judgment"), App. 65-66, ruling that Trustees' proposed retail use was reasonable, ordering the City to take any and all actions to facilitate, and not interfere with, improvements to be made to a street servicing the Property, enjoining the City and members of its Council from interfering with the proposed retail use of the Property and the installation of the requisite street improvements, and ordering the City to issue all approvals and permits to allow the retail development of the Property consistent with that Judgment.

On September 25, 1997, the City appealed the Trial Court's Judgment to the Court of Appeals. While that appeal was pending, the Ohio Supreme Court announced its decision in *Goldberg Companies, Inc. v. Richmond Heights City Council*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998), modifying the standard in Ohio for determining the constitutionality of a zoning ordinance as applied to property. Despite the fact that the test articulated in *Gerijo* and applied by the trial court was much more stringent than the one set forth in *Goldberg*, on August 20, 1998, the Court of Appeals vacated the Trial Court's Judgment and remanded the case for reconsideration in accordance with *Goldberg*. App. 56-61.[8]

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[8] Both *Gerijo* and *Goldberg* involve a determination as to whether a zoning ordinance substantially advances legitimate state interests. *Goldberg*, however, did away with the requirement in *Gerijo* that the ordinance must also deprive the owner of the economic viable use of property. The trial court found that the Trustees proved both elements

(Continued on following page)

The Trustees appealed that decision to the Ohio Supreme Court. On February 9, 2000, the Ohio Supreme Court announced its decision in *Shemo I*, unanimously reversing the decision of the Court of Appeals and affirming and reinstating the Trial Court's Judgment. The Ohio Supreme Court found "that the trial court's conclusion that the property is uninhabitable is supported by competent, credible evidence," that the Trustees "have shown that the city lacks any legitimate governmental health, safety, and welfare concerns in support of the U-2-A zoning classification," and that "the trial court was warranted in holding that the proposed U-4 commercial classification is not detrimental to the health, safety, and welfare concerns of the City and is a reasonable classification of the property." *Shemo I*, 88 Ohio St. 3d at 13, 722 N.E.2d at 1024, App. 44-45.

A motion for reconsideration filed by the City on February 17, 2000 was unanimously denied by the Ohio Supreme Court on April 21, 2000. *Shemo v. Mayfield Heights*, 88 Ohio St. 3d 1489, 727 N.E.2d 596 (2000).

Vowing to continue its fight against the Trustees' retail development of the Property,[9] in April 2000 the City claimed frivolously and for the first time an ownership interest in a portion of the Property that had been dedicated to the City in 1927 for the construction of streets (creating so-called "paper streets"), and threatened to sell

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of *Gerijo*; therefore, it was unnecessary for the Court of Appeals to remand the case.

[9] During a public meeting held on February 14, 2000, five days after the Ohio Supreme Court decided *Shemo I*, the City's law director advised the City's Council and Mayor and audience: "And I also believe we have other legal recourse and again, the Mayor and this Council, has [sic] been very supportive of all you folks in this particular fight, and they continue to be supportive and as those issues unfold, I can tell you, I don't believe the legal fight is over." Evidence of Relators filed in Case No. 01-1325 on October 16, 2001 ("Rel. Evid."), Exhibit A.

those "paper streets."[10] It was clear that the City had abandoned such interest more than 40 years earlier by accepting the dedication of a subdivision to the west of the Property, thereby blocking access to the paper streets and rendering the Property landlocked. *State ex rel. Shemo v. Mayfield Heights*, 95 Ohio St. 3d 59, 68, 765 N.E.2d 345, 354-355 (2002) ("*Shemo IV*"), App. 15-17. Nevertheless, the Trustees were compelled to file an action for declaratory and injunctive relief to block the City from trying to sell the "paper streets" and to declare that the City had abandoned them. In order to avoid further delays in the development of the Property, eight months later, on December 29, 2000, the Trustees and the City entered into a stipulated judgment entry by which the City formally vacated the paper streets. Rel. Evid., Ex. B.

On March 2, 2001, the Trustees filed with the City's Planning Commission their application for preliminary approval of road improvement plans for the retail development of the Property. Despite its having been clearly affirmed and reinstated by the Ohio Supreme Court, the City refused to comply with the Trial Court's Judgment and continued to block the Trustees' judicially approved retail use, now disingenuously claiming that in *Shemo I*, the Ohio Supreme Court had determined that access to and from the *only public street* providing access to the Property, Maplewood Road (one of only two necessary points of access to the Property, the other being a driveway

[10] The City's description of the Property as "vacant, undeveloped land platted as a single-family residential subdivision", Pet. at 17, is misleading. The paper streets were included in a platted single-family residential subdivision that included only half of the Property, not all of it. Relators' Compendium of Exhibits filed in Case No. 01-1325 on July 23, 2001 ("Rel. Comp."), Exhibit K-3. Part of the same subdivision immediately south of the Property had been rezoned by the City for retail use. Trial testimony of Michael A. Shemo in *Shemo I*, Transcript at 139.

easement through private property) was confined to emergency use.[11]

On May 16, 2001, the Trustees filed a Complaint for a Writ of Mandamus in the Ohio Supreme Court seeking to compel the City, its Mayor and the members of its Council to approve the Trustees' road improvement plans and to grant all other permits and approvals necessary for the retail development of the Property in accordance with the Trial Court's Judgment as affirmed and reinstated by the Ohio Supreme Court. The Trustees' Complaint included a second claim for relief – the issuance of a writ of mandamus compelling the City to institute proceedings in the Cuyahoga County Probate Court to determine the extent, if any, to which the value of the Trustees' use of the Property was diminished as a consequence of the City's continuing unconstitutional application of its single-family zoning regulations to the Property.[12]

On August 8, 2001, the Ohio Supreme Court unanimously entered a peremptory writ of mandamus as to the first of the Trustees' two claims, ordering the City to approve the Trustees' road improvement plans as provided for in the Trial Court's Judgment and to grant all other permits and approvals necessary for the retail development of the Property in accordance with the Trial Court's Judgment. *State ex rel. Shemo v. Mayfield Heights*, 93 Ohio St. 3d 1, 752 N.E.2d 854 (2001) ("*Shemo III*"), App. 20-29.

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[11] Rel. Evid., Ex. B, which also contains a detailed description of other attempts by the City to block the development of the Property.

[12] The Trustees' Complaint was dismissed without prejudice as a consequence of a technical defect in their compliance with the Ohio Supreme Court's Rules of Practice, *State ex rel. Shemo v. Mayfield Heights*, 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001) ("*Shemo II*"), App. 30-33, and the Trustees immediately refiled their Complaint for a Writ of Mandamus on July 23, 2001.

On April 10, 2002, after the Trustees' second claim was fully briefed and evidence submitted in accordance with the Ohio Supreme Court's Rules of Practice, that Court unanimously issued a writ compelling the City "to commence appropriation proceedings to determine the amount of the City's temporary taking of relator's property." *Shemo IV*, 95 Ohio St. 3d at 70, 765 N.E.2d at 355-356, App. 19. The Ohio Supreme Court held that the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Ohio Constitution "guarantee that private property shall not be taken for public use without just compensation," and noted that under Ohio law "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." 95 Ohio St. 3d at 63, 765 N.E.2d at 350, App. 7, *citing State ex rel. Elsass v. Shelby County Board Of Commissioners*, 92 Ohio St. 3d 529, 751 N.E.2d 1032 (2001).

The Ohio Supreme Court then determined that the Trustees had established a compensable taking under both the United States and Ohio Constitutions, citing this Court's decisions in *Agins v. Tiburon*, 447 U.S. 255 (1980), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), as well as its own prior decision in *Goldberg* in which it adopted the disjunctive two-part test for a regulatory taking set forth in *Agins*.[13] 95 Ohio St. 3d at 63, 765 N.E.2d at 350, App. 8. Citing *State ex rel. BSW Development Group v. Dayton*, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (1998), *cert. denied*, 526 U.S. 1067 (1999), the Ohio Supreme Court held that either of the two prongs

[13] "[A]pplication of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land." 447 U.S. at 260.

of the test establishes a taking. 95 Ohio St. 3d at 64, 765 N.E.2d at 351, App. 8-9. The Ohio Supreme Court held:

> It is evident that relators have satisfied the first prong, *i.e.*, the application of the U-1(1) and U-2-A zoning classifications to their property was unconstitutional in that the application of these classifications did not substantially advance legitimate state interests. The parties stipulated that the U-1(1) zoning classification as applied to relators' property was unconstitutional, and the common pleas court found, in the declaratory judgment reinstated by this court in *Shemo I*, that the U-2-A zoning classification was also unconstitutional because, as applied to relators' property, it did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights.
>
> * * *
>
> The U-1(1) and U-2-A single-family residential zoning classifications were unconstitutionally applied to relators' property, and the property was, in fact, not suitable for this residential use. Therefore, relators have proved a taking of their property.

95 Ohio St. 3d at 64-65, 765 N.E.2d at 351-352, App. 9-11.

With respect to the measure of damages, the Ohio Supreme Court, relying on *Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102 (1933), held "relators are entitled to the diminution in the value of the use of their property during the period of the temporary taking." 95 Ohio St. 3d at 69, 765 N.E.2d at 355, App. 18-19. The Ohio Supreme Court determined that the period of the temporary taking commenced when the single-family residential zoning regulations were applied to the Property on March 19, 1992, the date the Trustees filed their initial lawsuit against the City, and ended in April 2001, when the Property was rezoned to allow retail use of the Property

and the City's unconstitutional zoning regulations were no longer applied to the Property. *Id.*

The Ohio Supreme Court thus fashioned a remedy under the Ohio Constitution to compensate the Trustees to the extent that the value of their use of the Property was diminished by application of zoning regulations that was arbitrary, capricious and unreasonable, and failed to substantially advance legitimate governmental interests.

On April 22, 2002, the City asked the Ohio Supreme Court to reconsider its decision in *Shemo IV*. The City advanced three reasons for reconsideration. First, it argued that *Shemo IV* overruled *sub silentio Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974), in which the Ohio Supreme Court held that a direct cause of action for money damages cannot be maintained against a municipality as a result of the adoption of an invalid zoning ordinance. The Ohio Supreme Court rejected this argument because the claim asserted by the Trustees was not a direct cause of action for damages. *State ex rel. Shemo v. Mayfield Heights*, 96 Ohio St. 3d 379, 380, 775 N.E.2d 493, 495 (2002) ("*Shemo V*"), App. 48.[14]

Next, the City complained that the Ohio Supreme Court had failed in its takings analysis to apply the *ad hoc* factual inquiry set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Expressing doubts as to the applicability of "the *Penn Cent./Palazzolo* analysis," 96 Ohio St. 3d at 381, 775 N.E.2d at 496, App. 50, the Ohio Supreme Court nevertheless responded to the City's complaint and concluded that reconsideration was not warranted:

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[14] Ohio does not permit a direct action for damages against a municipality for a regulatory taking. *Superior Uptown*, 39 Ohio St. 2d at 40, 313 N.E.2d at 823; Ohio Rev. Code § 2744.03(A)(1) and (3).

> Even assuming that the *Penn Cent./Palazzolo* analysis applies, a finding of a compensable taking is still warranted. Restricting relators' land to residential use on property that was held to be unsuitable for residential use had an obvious adverse economic impact on relators, which necessarily interfered with their reasonable investment-backed expectations when they requested that the property be rezoned for retail development. Further, the city's application of residential classifications to their property did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights. *Shemo*, 95 Ohio St.3d at 64, 765 N.E.2d 345. . . . In addition, the duration of the challenged restrictions was much lengthier here than the challenged restrictions in *Tahoe-Sierra* [*Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002)], which totaled 32 months, . . . 122 S.Ct. at 1489, . . . ("the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim").

95 Ohio St. 3d at 381-382, 765 N.E.2d at 496, App. 50-51.

Finally, the City asked the Ohio Supreme Court to reconsider the length of the period for the compensable taking. After review, the Ohio Supreme Court shortened the period of the temporary taking by establishing a starting date in June 1995, when the Trustees refiled their action challenging the constitutionality of the U-1(1) classification as applied to their Property and seeking approval of a retail use on their Property, as opposed to March 19, 1992, when the Trustees first commenced their challenge to the constitutionality of the application of the U-1(1) classification to the Property. App. 53. The Court rejected the City's argument that the period of the taking

should be further shortened because of procedural delays in the rezoning of the Property. App. 54.

In *Shemo V*, the court *sua sponte* considered this Court's decision in *Tahoe-Sierra*,[15] noting that it involved a claim under the second prong of the regulatory takings test set forth in *Agins*, and reiterating its conclusion that "application of the *Penn Cent./Palazzolo* ad hoc factual inquiry here does not, as previously discussed, require a different holding." 95 Ohio St. 3d at 382, 765 N.E.2d at 497, App. 52.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Was Not "Final" Within The Meaning Of 28 U.S.C. § 1257.

This Court's jurisdiction to review decisions of a state's highest court by writ of certiorari extends only to review of "final judgments or decrees." 28 U.S.C. § 1257(a). Under this Court's longstanding precedent, a judgment in a Takings case is not "final", and therefore is not subject to review by this Court, until a determination of just compensation has been made. *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917). In the case *sub judice*, after determining that the Trustees had established a compensable taking of their Property, the Ohio Supreme Court granted the Trustees' request for a writ of mandamus to compel the City to commence appropriation proceedings for the determination of the Trustees' damages, if any, for the City's taking of the use of their Property. App. at 19. The compensation proceedings are to be commenced in the Cuyahoga County Common Pleas Court, Probate Division. Because there has not yet been a determination of just compensation, under *Grays* and its

[15] This Court's decision in *Tahoe-Sierra* was not announced until after the City asked the Ohio Supreme Court to reconsider its decision in *Shemo IV*.

progeny this Court has no jurisdiction to review the decision of the Ohio Supreme Court.

In *Grays*, a case with a procedural history strikingly similar to that of this case, plaintiffs opposed a condemnation procedure involving construction of a railroad on their property, alleging that the proposed construction constituted a taking of their property without due process of law in violation of the Washington Constitution. A lower court entered an order of condemnation and set proceedings to determine the damages and compensation. Before the issue of just compensation was decided, plaintiffs applied for and obtained a writ of certiorari from the state supreme court to review the constitutional question. The Washington Supreme Court affirmed the judgment of the lower court and remanded the case to that court for further proceedings. In assessing its jurisdiction to review the state court's decision, this Court considered the finality of the state court judgment and announced the now well-settled rule applicable to takings claims:

> [W]e cannot regard a condemnation proceeding taken under the authority of the Constitution of Washington and the Act of 1913 as severable into two distinct branches. The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and, of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

243 U.S. at 256.

Hence the Court concluded that it was without jurisdiction to review the state court decision. This holding has been reaffirmed in subsequent cases, most recently in *San Diego Gas & Electric v. City of San Diego*, 450 U.S.

621 (1981). There, the plaintiff alleged that the city's rezoning of its property deprived it of the beneficial use of its property and, therefore, constituted a taking without just compensation in violation of the Federal and State Constitutions. This Court was presented with a situation that was the reverse of the typical takings question – the state court had determined that monetary compensation was not an appropriate remedy, but had not decided whether any taking had occurred, and thus remanded the case to the lower court for further proceedings. This Court considered whether it had jurisdiction to review the decision under 28 U.S.C. § 1257. Relying on *Grays*, this Court stated as follows: "[A] state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not 'final.'" 450 U.S. at 632-33. Based on this principle, the Court found that there was no final decision and dismissed the appeal for want of jurisdiction.

The Court should similarly dismiss the City's Petition. *See also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 163 (1973) ("[I]n [eminent domain] cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem."); *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 68 (1948) ("[A] decision that a taking by eminent domain is for public use, where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation.").

It is indisputable that Petitioners have the burden of affirmatively establishing this Court's jurisdiction. *See Republic Natural Gas Co.*, 334 U.S. at 70. The City has

preemptively and prematurely filed its Petition before a determination of just compensation has been made. Given this Court's clear and unambiguous rule that takings proceedings are not final judgments subject to review until compensation has been determined, the Court should deny the City's Petition.

II. The Decision Below Rests On Independent And Adequate State Law Grounds.

This Court has long respected interpretations of state law by a state's highest court to be conclusive and binding on it. *See, e.g., Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *California v. Freeman*, 488 U.S. 1311, 1313 (1989).

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) (emphasis added).

The Trustees' claims were asserted and addressed by the Ohio Supreme Court under both Article I, Section 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. In adopting a remedy to compensate the Trustees to the extent the value of their use of the Property was diminished by the City's application of single-family zoning classifications that was arbitrary, capricious, and unreasonable, and failed to substantially advance legitimate governmental interests,

it is clear that the decision of the Ohio Supreme Court is independently grounded upon state constitutional law principles.[16]

It is "'the settled rule that where the judgment of a state court rests upon two grounds, one of which is Federal and the other non-federal in character, [this Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965) (*quoting Cramp v. Board of Public Instruction*, 368 U.S. 278, 281 (1961), *in turn quoting Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

This case is strikingly similar to *Jankovich*. In *Jankovich*, the Indiana Supreme Court held that the City of Gary's airport zoning ordinance "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." 379 U.S. at 489, *quoting* 244 Ind. 574, 584, 193 N.E. 2d 237, 242 (1965). Upon review, however, this Court observed that the state court decision addressed "the just compensation requirement of the Indiana Constitution . . . as well as . . . the Fourteenth Amendment." 379 U.S. at 491. Noting that the state court opinion "quite understandably" cited both state and federal decisions, this Court concluded that "even though [the] opinion relie[d] on similar provisions in both the Federal and State Constitutions," the state constitutional provision was "an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Id.* at 492. Similarly, while the court below discussed the Trustees' takings claims in the context of both federal and state law, it is clear that those claims

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[16] The City has not suggested and cannot show that the Ohio Supreme Court's determination of the Trustees' takings claim under the Ohio Constitution somehow trenches on any rights secured by the Federal Constitution.

were resolved on independent and adequate state constitutional grounds, as set forth in previous Ohio decisions.

The existence of an independent and adequate state-law basis for the Ohio Supreme Court's decision is evident from the text of *Shemo IV*. The court began its analysis by noting that it was addressing both "[t]he United States and the Ohio Constitutions," each of which "guarantee[s] that private property should not be taken for public use without just compensation." App. 7 (emphasis added). And the court specifically cited in this regard Section 19, Article I, of the Ohio Constitution, which provides that "[p]rivate property shall ever be held inviolate" and that if property is taken by the State, "compensation shall be made to the owner. . . ." *Id.*

In assessing whether a taking had occurred, the Ohio Supreme Court noted the *Agins* test and then added that in *Goldberg* and *BSW* it had "also adopted" the same test. App. 8.[17] Since the Ohio Supreme Court was bound in its resolution of the Trustees' federal takings claim by this

[17] In *BSW*, the court relied on *State ex rel. OTR v. City Of Columbus*, 76 Ohio St. 3d 203, 667 N.E.2d 8 (1996), in which it held: "In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right. . . . Such an interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises." 76 Ohio St. 3d at 206-207, 667 N.E.2d at 11-12. *OTR* in turn relied upon *Smith v. Erie Railroad Co.*, 134 Ohio St. 135, 16 N.E.2d 310 (1938), Syllabus, Para. 1, which states: "Under Section 19, Article I of the [Ohio] Constitution, which requires compensation to be made for private property taken for public use, *any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises*, entitles the owner to compensation." (Emphasis added.) These decisions reveal that Ohio's property jurisprudence is in marked contrast to decisions of this Court like *Andrus v. Allard*, 444 U.S. 51 (1979), in which this Court held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." 444 U.S. at 65-66.

Court's interpretation of the United States Constitution, and has no discretion to "adopt" or not "adopt" such an interpretation, its announced "adoption" of the *Agins* test can only mean that in construing the Ohio Constitution, the court independently determined that it would "also" follow the approach outline in *Agins*.

Indeed, in elaborating on its conclusion that "[t]his test is disjunctive," the court cited no less than seven state court decisions – *Gerijo, Goldberg,* and *BSW* in the text and four others in a footnote, App. 8-9 – as providing the basis for that conclusion. "[U]nderstandably," as in *Jankovich*, the court also referred to decisions of this Court. Its only references to any such decisions other than *Agins*, however, were to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987) (which it found persuasive on the issue of the Trustees' entitlement to compensation for a temporary taking – consistent with that court's earlier decision in *Norwood* – despite the fact that *First English* arose under the second prong of *Agins*), and to a statement in *Palazzolo* that a taking may occur even where "a regulation places limitations on land that fall short of eliminating all economically beneficial use. . . . " App. 9. *Palazzolo* did not purport to apply the first prong of *Agins*, however, which is the subject of the "Questions Presented" by the Petition. Hence, *Palazzolo* could not possibly be a part of the *basis* for the ruling of the Ohio Supreme Court challenged in the City's Petition.

Finally, with respect to the measure of compensation, the Ohio Supreme Court relied on state law as set forth in *Norwood*, Syllabus, Para. 4, cited at App. 18-19, in which that court held that the measure of compensation under Article I, Section 19 of the Ohio Constitution for a temporary taking is the "diminution in the value of the use of the property during [the relevant] period."

Since deciding *Jankovich*, this Court's approach to discerning the existence of adequate and independent state grounds has evolved, most notably in the review of

state court decisions in criminal cases. Observing that state courts "handle the vast bulk of all criminal litigation in this country" and "necessarily create a considerable body of 'federal law' in the process," in *Michigan v. Long*, 463 U.S. 1032, 1042, n.8 (1983), the Court explained that it had "become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States." *Id.* 13. The Court held that where the adequacy and independence of a state-law ground is "not clear from the face of the [state court's] opinion," it would presume and "accept as the most reasonable explanation that the court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1041.

Even under this approach, however, the absence of an explicit statement, in so many words, that "we are deciding this case on state-law grounds" is not a *sine qua non* for determining that a separate state-law basis for a decision exists. *E.g., Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("we will not impose on state courts the responsibility for using particular language"); *Glenn v. Bartlett*, 98 F.3d 721, 725 (2d Cir. 1996) ("to require a state court to use specific talismanic phrases when ruling in the alternative would be undue formalism; it would also intrude on the state court's autonomy without advancing the federalism and comity interests protected by the independent and adequate state grounds doctrine"). The real question is always whether it "fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law," since "[t]he [*Long*] presumption applies *only*" in such circumstances. *Coleman*, 501 U.S. at 739 (emphasis added). This is necessarily true, since the independent and adequate state-law doctrine is based on "the limitations of [this Court's] own jurisdiction." *Herb v. Pitcairn*, 324 U.S. at 125.

It is obvious from the text of *Shemo IV* that the Ohio Supreme Court *chose* to "adopt" the two-part *Agins* test in

resolving the takings issue under the Ohio Constitution. That the Ohio Supreme Court may have regarded some decisions of this Court as persuasive as to the proper construction of the Ohio Constitution does not change the fact that the holding was based on adequate and independent state-law grounds under that Constitution.

III. The "Questions Presented" In The Petition Were Not Timely And Properly Raised Below And The Petition Fails To Comply With Rule 14(g)(i) Of This Court.

Rule 14(g)(i) of this Court requires that a party seeking review of a state court judgment set forth with specificity in its petition: (1) each stage in the proceedings when the federal questions sought to be reviewed were raised; (2) the "method or manner of raising them and way in which they were passed on" by the state courts; and (3) "pertinent quotations of the record . . . so as to show the federal question was timely and properly raised." Except for a brief passage from its Motion for Reconsideration before the Ohio Supreme Court, the City has failed to comply with the Rule, which is intended to permit Petitioner to demonstrate that this Court has jurisdiction. The City's failure to comply with Rule 14(g)(i) is amply explained by the fact that the City, as demonstrated below, has in fact failed to timely and properly raise the federal questions that it is seeking to bring before this Court.

The City is asking this Court to overrule a line of authority that long precedes this case, which holds that "application of general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interest . . . ." *Agins*, 447 U.S. at 260; *see also Nectow v. Cambridge,* 277 U.S. 183 (1928). However, the City's principal argument in the original action for mandamus was far narrower and fact-specific in

nature[18], and its only discussion of *Agins* in the proceedings below was to observe that this Court did not find a taking under the facts in *Agins*. The City never challenged this Court's reasoning or analysis in *Agins* or the test it set forth. Similarly, the City never discussed Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.*, in the proceedings below. The one brief occasion on which the City claims, Pet. at 9, to have raised before the Ohio Supreme Court the issues which it presents in its Petition, upon examination, does not in fact do that. Moreover, the quoted language was presented in support of a contention that was addressed to how the Ohio Supreme Court should interpret Ohio law, not as to how it should interpret the U.S. Constitution.[19]

In *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992), this Court stated: "In reviewing the judgments of state courts under the jurisdictional grant of *28 U. S. C. § 1257,* the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."

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[18] "Proposition of Law No. I: When A Zoning Ordinance Restricting The Use Of Property To Residential Use Is Declared Unconstitutional There Is No Involuntary Taking Of Property Without Just Compensation Where: (A) At The Time The Property Owner Acquired Ownership Of The Land Its Zoning Was Limited To Residential Use; (B) There Was No Deprivation Of The Right To Continue The Prior Use Of The Property; and (C) The Property Owner Failed To Establish Any Harm Caused By The Government Between The Time It Became The Owner Of The Property And The Time The Zoning Ordinance Was Declared Unconstitutional." Brief of Respondents in Case No. 01-1325 filed November 12, 2001, at i, 5.

[19] "This Court should reconsider its enlargement of Ohio law to include the right to devote property to the use for which it should be zoned as compensable under the Takings Clause". Respondent's Motion for Reconsideration in Case No. 01-1325 filed April 22, 2002, at 3.

Yee's cautionary instruction applies here. As the City never suggested that the Ohio Supreme Court's consideration of *Agins* in connection with the Trustees' takings claim was erroneous, that Court had no reason to engage in such analysis. Under similar circumstances, this Court declined to review *Agins* in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1990):

> [W]e note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. . . . *The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of amici to revisit these precedents.*

526 U.S. at 704 (emphasis added) (citations omitted).

Having failed to demonstrate that it timely and properly raised below the issues it seeks to raise here, the City's Petition should be denied.

IV. The Ohio Supreme Court Correctly Applied This Court's Takings Decisions, And This Case Would Be An Inappropriate Vehicle For Reconsidering Those Decisions.

a. This Ohio Supreme Court Correctly Applied *Agins* And The Takings Decisions Of This Court.

If this Court reaches the issues presented by the Petition, it bears emphasis that the City has not contended that the Ohio Supreme Court has done other than to adopt and faithfully apply *Agins* and this Court's Takings Clause jurisprudence. *Agins* set forth the following test: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner of economically viable use of his land." 447 U.S. at 260.

This test, and specifically its first prong, was hardly novel and had antecedents back to the earliest zoning cases heard by this Court. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court upheld the constitutionality of a comprehensive zoning scheme, but cautioned that such ordinances "must find their justification in some aspect of the police power, asserted for the public welfare." 272 U.S. at 387.

Nectow v. Cambridge, decided two years later, confirmed that the power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is "not unlimited": "[O]ther questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, convenience and general welfare." 277 U.S. at 188. Where a zoning regulation does not bear a substantial relation to a community's public health, safety, convenience and welfare as applied to property, the "invasion of property" occasioned by that application is "serious and highly injurious." *Id.*

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), this Court reiterated what it had observed 75 years earlier: "A prohibition simply upon the use of property for purposes that are declared, *by valid legislation*, to be injurious to the health, morals or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." 369 U.S. at 593 (emphasis added), *quoting Mugler v. Kansas*, 123 U.S. 623, 668 (1887). *Goldblatt* implicitly recognized that *invalid legislation* imposing limitations on the use of property can affect a taking of property.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), decided roughly contemporaneously with *Agins*, this Court held that in the absence of any police power justification or any reasonable basis for sustaining it, a Florida statute directing payment to the county of interest accruing on interpleader funds deposited in county court registries, when a fee, prescribed by another

statute, was charged for the clerk's services in receiving the fund into the registry, violated the Takings Clause of the Fifth Amendment. That clause, the Court explained, "stands as a shield against the arbitrary use of governmental power." 449 U.S. at 164.

Since deciding *Agins*, this Court has reiterated the *Agins* test on numerous occasions. *See, e.g., Riverside Bayview Homes, Inc.*, 474 U.S. at 126; *Keystone Bituminous Coal Assn.*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In *Del Monte Dunes*, this Court expressly declined to reconsider *Agins*. 526 U.S. at 704. In *Tahoe-Sierra*, this Court once again reiterated the *Agins* test. Despite holding that temporary moratoria on development imposed during the development of a comprehensive land-use plan for the Lake Tahoe area did not constitute a *per se* taking of property, the Court explained that the landowners could have attempted to establish a taking on the theory "that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey*." *Tahoe-Sierra*, 122 S. Ct. at 1485.

In light of this history, the Ohio Supreme Court acted entirely appropriately in applying the *Agins* test as the appropriate legal standard for finding a taking under the U.S. Constitution. Since it is undisputed that application of the City's zoning ordinance to the Property did not substantially advance legitimate state interests, the Ohio Supreme Court's issuance of a writ compelling the City to commence appropriation proceedings to determine the compensation due the Trustees as a result of the City's temporary taking of their property is unobjectionable under this Court's precedents.

b. This Is An Inappropriate Case In Which To Reconsider *Agins*.

By ignoring its own misconduct and distorting the factual and procedural background of this case, the City

seeks to depict this case as one presenting issues "critical to local government throughout the country." Pet. at 21. Contrary to the City's suggestion, "local government[s] throughout the country" are not guilty of the misconduct committed by the City in this case. Because the Ohio Supreme Court's decision results from the unique facts of this case, this is not an appropriate case for reconsideration of *Agins*.

In its effort to portray this case as presenting a wrong worthy of this Court's consideration, the City audaciously claims that the Trustees suffered no economic harm on account of the City's unconstitutional interference with the Trustees' use of the Property, are "likely being rewarded far beyond their reasonable expectations", Pet. at 17, and, in fact, have "reaped a substantial reward", Pet. at 18, on account of the City's rezoning the Property after being ordered to do so by the courts. Not surprisingly, there is no factual or logical support for the City's claim or the City's argument that any increase in value of the Property occasioned by the rezoning in April 2001 compensates the Trustees for the diminution in the value of their use of the Property while it was unconstitutionally zoned by the City for single-family use.[20] According to the City, no economic consequences flowed from its arbitrary and capricious application of zoning regulations that prevented the Trustees from using their Property. For that proposition to be true, it would also have to be true that, had the Property been zoned for a constitutionally permitted use during the almost six-year period for which the court determined the Trustees were entitled to compensation, the Trustees

[20] Initially, the Trustees claimed that the period of the taking should begin in March 1992, and the court below agreed. On reconsideration, the court revised the starting date to June 1995 when the Trustees first sought to develop their Property for retail use. In both *Shemo IV* and *Shemo V*, the court below held that the taking period ended in April 2001, when the Property was rezoned to commercial use.

would have elected not to develop the Property, would have borne the expenses of maintaining the Property, and would have received no income from it.

It may be that obtaining rights to which one is entitled under the U.S. and Ohio Constitutions is a windfall in the City of Mayfield Heights; hopefully, that proposition is not true in the rest of the United States.

Of course the City is correct in stating that the Property increased in value once it was rezoned to a retail use as a consequence of the court orders to do so. Before then, however, "*the value of the use of their property*," *Shemo IV*, App. 18, was *diminished* by the City's arbitrary and capricious action – not inaction.

The City sought to convince the Ohio Supreme Court that it would be unfair to award compensation to the Trustees under the facts of this case and that a decision awarding compensation would "have an extreme chilling effect on a municipality's exercise of their [sic] constitutional police power with respect to land use." Brief of Respondents, filed November 12, 2001, at 10. The Ohio Supreme Court unanimously determined that the City's conduct in this case warranted a finding that a taking had occurred for which compensation was due the Trustees.

As the Ohio Supreme Court observed in *Shemo IV*, a city may stay an adverse "judgment without posting bond pending its resolution on appeal." App. 28. Thus, in Ohio a city knows that even if a challenge as to the constitutionality of a zoning regulation is decided against it at the trial court level, it has the right to appeal that decision, together with any order containing injunctive relief, without posting a supersedeas bond and may thereby postpone for years any adverse final determination. In this case, the City postponed compliance with the adverse determination of the trial court for more than five years.

Cities in Ohio understand that they have the ability to delay an owner's use of his or her property for years by enforcing unconstitutional zoning regulations and by defending that enforcement over the course of years of litigation. In the absence of a compensation remedy, some

cities will use that advantage, without regard to injury they may inflict on property owners, to extract clearly unlawful concessions as to the use of their property, or to curry favor with some residents by refusing to make unpopular but constitutionally-mandated decisions, forcing the courts to make unpopular decisions which the cities, themselves, should have made. In either event, property owners may and generally will be deprived of their constitutional rights for years.[21]

Here, the City refused to make the constitutionally-mandated decision to allow the Trustees a reasonable use of their property, foisted the obligation to make that decision on the courts, and, when the courts made the decision that the City was obliged to make, blamed the courts for the City's failure. In a re-election campaign flyer circulated by the City's mayor to residents of the City during the week of April 22, 2001, she stated:

> FACT None of us want this development; not the residents, not Council, not I. The city has expended a great deal of money fighting this case. Many of us have spent long hours in court to represent the interests of our community. Remember that the Ohio Supreme Court Justices, not the City of Mayfield Heights or any of its representatives, made this decision. The Supreme Court Justices hold the sole blame for this fiasco.

Compendium of Exhibits filed on behalf of Relators in Case No. 01-1325 on July 23, 2001, Exhibit J.

The Ohio Supreme Court found that the City's conduct constituted a taking for which a claim in inverse condemnation was available. To have done otherwise would have left cities in Ohio unaccountable and property owners without a remedy under Ohio law. That, of course, is

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[21] While the life of land may be infinite, the economic opportunities for its use and development are not. Those opportunities are governed by economic and market factors that are dynamic and fleeting.

exactly what the City would prefer – no accountability for its conduct and no remedy for the Trustees under Ohio law, thus leaving the Trustees alone to bear the burden of the City's unlawful conduct. Faced with the facts in this case, the Ohio Supreme Court determined that the Trustees were entitled to compensation and fashioned a remedy under Ohio law that the court deemed appropriate. Those facts do not warrant reconsideration of *Agins* in this case.

The City also contends that this case "squarely presents the issue of whether a zoning regulation which does not substantially advance a legitimate public purpose is *per se* violative of the Takings Clause of the Fifth Amendment to the United States Constitution . . .," Pet. at 2-3; *i.e.*, that a deprivation of property arising from the failure of a zoning ordinance to substantially advance legitimate governmental interests is not a categorical taking, and must be subjected to the analysis in *Penn Central*. Although the Ohio Supreme Court expressed its view that under the facts of this case a determination that a taking had occurred did not require application of the *Penn Central* analysis, that court, in response to both the City's request and this Court's decision in *Tahoe-Sierra*, *did* apply the *Penn Central* factors and *still* concluded that the City had taken the Property. App. 50-52.

Given the egregious conduct of the City and the fact that the Ohio Supreme Court actually applied the *Penn Central* factors and, upon application of those factors, still found a taking, this clearly is not an appropriate case in which to determine whether or not the City's conduct constitutes a categorical taking.

CONCLUSION

The City has petitioned this Court to interpret the Takings Clause of the Fifth Amendment to the United States Constitution as preventing the Ohio Supreme Court from fashioning a remedy under the Ohio Constitution to compensate property owners against whose property a city

has arbitrarily and capriciously enforced a zoning ordinance that fails to substantially advance legitimate governmental interests as to such property. In doing so, the City has misstated the factual and procedural background of this dispute, disregarded the absence of finality of the judgment below, failed to raise in the court below the issues it asks this Court to consider, and misstated the issues presented by this case by ignoring the Ohio Supreme Court's application of the *Penn Central* analysis on reconsideration. For the reasons set forth herein, the City's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHELDON BERNS, ESQ.
Counsel of Record
BENJAMIN J. OCKNER, ESQ.
JORDAN BERNS, ESQ.
BERNS, OCKNER &
GREENBERGER, LLC
24500 Chagrin Blvd., Suite 101
Beachwood, Ohio 44122
Telephone: 216-831-8838
Facsimile: 216-464-4489

STEVEN S. ROSENTHAL, ESQ.
ALAN PALMER, ESQ.
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005-2327
Telephone: 202-682-3500
Facsimile: 202-682-3580

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In The
Supreme Court of the United States

CITY OF MAYFIELD HEIGHTS,
MAYOR MARGARET A. EGENSPERGER, *et al.*,

Petitioners,

v.

MICHAEL A. SHEMO, TRUSTEE, AND
LARRY GOLDBERG, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

PETITIONERS' REPLY BRIEF

LEONARD F. CARR, ESQ. (#0029884)
Counsel of Record
L. BRYAN CARR, ESQ. (#0066649)
1392 SOM Center Road
Mayfield Heights, Ohio 44124
Telephone: 440-473-2277
Facsimile: 440-473-0166

ANTHONY J. COYNE, ESQ. (#0039605)
BRUCE G. RINKER, ESQ. (#0017493)
ELI MANOS, ESQ. (#0006468)
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
Telephone: 216-523-1500
Facsimile: 216-523-1705 *Counsel for Petitioners*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO COUNTER STATEMENT OF THE CASE

We will not engage in a point-by-point refutation of Respondents' Michael A. Shemo, Trustee, and Larry Goldberg, Trustee (collectively "Trustees") inflammatory exposition of facts. Petitioners (collectively "Mayfield Heights" or "the City") have raised on this appeal solely the decision of the Ohio Supreme Court granting the Petitioners' petition for a writ of mandamus to compel Mayfield Heights to appropriate the Trustees' property in the case of *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002) (App. 1)[1] predicated upon the holding of the Ohio Supreme Court in the case of *Shemo v. Mayfield Hts.*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) that the single-family zoning classification of the Trustees' property failed to substantially advance the public health, safety and welfare. The court issued the writ of mandamus, holding that a categorical taking had occurred by reason of the limitations imposed by the Zoning Ordinance and that the Trustees were entitled to compensation for the temporary taking of their property prior to its rezoning to retail as they requested.

At pages 6 to 8 of their Brief, the Trustees complain about the difficulties they had in gaining approval for their proposed road improvements. The Supreme Court of Ohio issued a peremptory writ compelling the City of Mayfield Heights to approve the Trustees' road improvement plans, including the passage of commercial vehicles

[1] The reference is to the Appendix in the Petition for a Writ of Certiorari.

on Maplewood Drive through a residential neighborhood. *State ex rel. Shemo v. Mayfield Hts.*, 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001) (App. 20). The ruling was entered even though in *Shemo v. Mayfield Hts.*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) (App. 34) the court, in discounting the influence of traffic congestion, pointed out that the Trustees "propose to limit direct access from their property to the residential streets to cases of emergency only." (App. 42). Much of the fervent opposition from the City of Mayfield Heights and its Mayor, Margaret A. Egensperger, described at App. 22-23 in *State ex rel. Shemo v. Mayfield Hts.*, 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001) resulted from the release of the limitation pertaining to commercial traffic.

At pages 6 and 7 of their Brief, the Trustees protest that the City of Mayfield Heights "frivolously" raised the issue of the paper streets in the platted but undeveloped subdivision. The City's claim to ownership was not frivolous. The Ohio Supreme Court held in *Eggert v. Puleo*, 67 Ohio St. 3d 78, 616 N.E.2d 195 (1993), in the first paragraph of the syllabus, "[P]ursuant to R.C. 711.07, when a plat approved by a municipal corporation is recorded in the office of the county recorder, the fee of the land designated in the plat for public use vests in the municipal corporation." The City may, if it establishes it is in the public interest, sell its fee simple interest in platted but unimproved streets. *Bayer v. North College Hill*, 31 Ohio App. 3d 208, 510 N.E.2d 400 (1986). The stipulated judgment entry provided for vacation of the paper streets upon conveyance by the Trustees to the City of 1.3 acres of land [Exhibit 14 to Evidence of Relators filed in the Ohio Supreme Court in *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002) (App. 1)].

The foregoing facts are irrelevant to this proceeding. We raise them only to counter in part the Trustees' obsession of ill treatment.

I. The Holding Of The Ohio Supreme Court In This Case That A Categorical Taking Arises By Reason Of The Failure Of The Single-Family Zoning Of The Trustees' Property Fails To Substantially Advance A Legitimate Governmental Interest Conflicts With The Holdings Of This Court In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002), and *Armstrong v. United States*, 364 U.S. 40 (1960), And Is A Final Judgment Reviewable By This Court.

The significance of the holdings of the cases referenced in this heading was pointed out by this Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, at 122 S.Ct. 1478 as follows:

> We shall first explain why our cases do not support their proposed categorical rule – indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "[t]he temptation to adopt what amount to *per se* rules in either direction," *Palazzolo v. Rhode Island*, 533 U.S. 606, 636, 121 S.Ct. 2448, 150 L.Ed.2d 592

(2001) (O'CONNOR, J., concurring), we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646, designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S., at 636, 121 S.Ct. 2448 (O'CONNOR, J., concurring).

This Court should accept jurisdiction on the authority of *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), in which this Court took jurisdiction in order to settle important First Amendment issues even though that case had not been finally disposed of in that the issue of damages remained to be tried. As with the judgment of the Georgia Supreme Court in *Cox Broadcasting*, the judgment of the Ohio Supreme Court in this case "is plainly final on the federal issue and is not subject to further review in the state courts." *Id.* at 485.

It is unlikely that any federal issues will arise from the trial to determine compensation. The amount of compensation to be paid is a factual issue to be determined by jury on settled instructions which do not reach constitutional proportions. The eminent domain cases reaching this Court from the states for review of constitutional issues relate to the authority of the appropriating entity to take private property, not to the issue of compensation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Cincinnati v. Vester*, 281 U.S. 439 (1930).

The case of *State of Washington ex rel. Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917) is frequently cited in dictum for the proposition that an eminent domain case is not final for purposes of review by this Court until it is concluded through trial and appropriation. See, *Cox Broadcasting Corporation v. Cohn*, at 420 U.S. 477, n. 6. *Grays Harbor Logging Company* concerned a physical taking of property in which the owner unsuccessfully challenged in the state court the right of the appropriator to take the property. This Court denied review because under the law of the State of Washington the judgment sustaining the right of the appropriator was interlocutory.

As noted above, this Court in *Tahoe-Sierra Preservation Council*, noted the significant distinction between physical takings and regulatory takings and added at 122 S.Ct. 1479:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has

> been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646.

The "final decision" in this regulatory taking case was made when the Ohio Supreme Court compelled the City to initiate appropriation proceedings. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 744, and SCALIA, J., concurring at 750 (1997).

A final decision has been made. It is not reviewable by the Ohio courts. This case is ripe for review and the Court should accept jurisdiction so as not to leave unanswered the question of whether a land use regulation that fails to substantially advance a governmental interest categorically

constitutes a taking. This case raises the additional question of whether the Takings Clause of the Fifth Amendment to the United States Constitution provides a remedy for such a regulation.

II. The Decision Of The Ohio Supreme Court Is Clearly Governed By Federal Law.

The decision of the Ohio Supreme Court in this case, *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002), is premised upon and follows this Court's decisions on regulatory takings. The only reference to the Ohio Constitution is at 95 Ohio St. 3d 63 (App. 7), where it states:

> The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution.

The court goes on to hold:

> We must first determine whether relators have established a compensable taking of their property.
>
> The United States Supreme Court has consistently held that "application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" See *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126, 106 S.Ct. 455, 88 L.Ed.2d 419, quoting *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106;

> *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 485, 107 S.Ct. 1232, 94 L.Ed.2d 472.
>
> We have also adopted this test for a taking caused by a zoning law. See *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St. 3d 207, 211, 690 N.E.2d 510, quoting *Agins*, 447 U.S. at 260, 100 S.Ct. 2138, 65 L.Ed.2d 106. ("'The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land * * *'").

And at 95 Ohio St. 3d 64 and 65 (App. 9, 10), it discussed and founded its decision upon what it called the "*Agins* disjunctive test." Its decision in *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998) discusses and follows this Court's decisions with regard to regulatory takings.

Were it to have founded its conclusion independently upon the Ohio Constitution, it would have been obliged to overrule its decisions holding that the Takings Clause of the Ohio Constitution, Section 19 of Article I, is limited to the acquisition of property to be devoted to public use. *State ex rel. Fejes v. Akron*, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966); *McKee v. Akron*, 176 Ohio St. 282, 199 N.E.2d 592 (1964); *Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974). See, also, *In Re Appropriation of Easements From Leas*, 5 Ohio App. 3d 120, 449 N.E.2d 780 (1981). In *McKee v. Akron*, the court at 176 Ohio St. 284, after quoting Section 19, Article I, held, "[I]t should be noted that this section limits the right to compensation to cases where private property is *taken* for public use. If the framers of the Ohio Constitution intended to

require compensation whenever property was damaged by governmental activity, they could have so provided in unmistakable language."

In overruling the City's motion for reconsideration, the court in *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002) (App. 46) dismissed *Superior Uptown, Inc. v. Cleveland* as a claim for money damages and not as authority for the contention that a zoning ordinance held to be unconstitutional is rendered invalid, but that no action lies for the payment of compensation. We submit that that reading of the case is strained. The court, after holding the ordinance unconstitutional and invalid, held at 39 Ohio St. 2d 39:

> The award of damages against the city of Cleveland cannot stand. That award was based upon the deprivation of use of its property allegedly suffered by appellee during the period the rezoning ordinance was in effect. Many of the cases cited by appellee are appropriation cases and, therefore inapposite. There is no evidence in the record to support a finding that the rezoning ordinance was a disguised attempt by the appellant to take appellee's property for a public purpose. Such a taking is a precondition to the exercise of the eminent domain power.

Clearly, regulatory taking law in Ohio follows this Court's decisions with respect to the subject and is not based upon a reinterpretation of Section 19, Article I of the Ohio Constitution, which has stood unchanged since 1851.

III. Raising The Questions Below

At page 7 of the Petition, the City points out in its motion for reconsideration that the First Question Presented

relating to the holding of the Ohio Supreme Court that a categorical taking had occurred was erroneous by reason of this Court's decisions in *Penn Central Transportation Company v. City of New York* and *Palazzolo v. Rhode Island*. At that page it is pointed out that the court rejected the argument. In overruling the City's motion for reconsideration at App. 49, the court admonished the "attempted reargument of this contention."

With respect to the Second Question Presented, at page 9 of the Petition the City points out an excerpt from its brief in support of its motion for reconsideration, in which it argued that the Due Process Clause, and not the Takings Clause, applied to this case. At footnote 19 on page 22 of the Trustee's Brief in Opposition references made to the City's motion for reconsideration where this issue was raised with reference to Ohio law. Ohio law incorporates federal law in following this Court's holding in *Nectow v. Cambridge*, 277 U.S. 183 (1928). *State ex rel. Synod of Ohio Lutheran Churches of America v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942). In denying the motion for reconsideration, the Ohio Supreme Court rejected this argument.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD F. CARR, ESQ. (#0029884)
Counsel of Record
L. BRYAN CARR, ESQ. (#0066649)
1392 SOM Center Road
Mayfield Heights, Ohio 44124
Telephone: 440-473-2277
Facsimile: 440-473-0166

ANTHONY J. COYNE, ESQ.
(#0039605)
BRUCE G. RINKER, ESQ. (#0017493)
ELI MANOS, ESQ. (#0006468)
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
Telephone: 216-523-1500
Facsimile: 216-523-1705

Counsel for Petitioners